



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC CASE NO. 124 OF 2015

SHASHIKANT K. PATEL.....PLAINTIFF

VERSUS

THOMAS MARK MUMO MAINGEY.....DEFENDANT

JUDGMENT

By a Plaint dated the 10th April, 2015 and Amended on the 2nd October, 2017, the Plaintiff prays for:

a) An order of Specific Performance compelling the Defendant to complete the transfer of 17.5 acres out of the 63 acres of LR No. 1338/4/R which was subdivided into various portions with the Defendant portion being LR No. 1338/90 which was further subdivided to different parcels of land by the Defendant one of which is now Land Parcel Number 1338/111 and to which the Plaintiff is in occupation, to the Plaintiff.

b) In the alternative, the Deputy Registrar of this Honourable Court be mandated to execute all necessary documents required to complete the transfers in favour of the Plaintiff including the Land Control Board application in respect of 17.5 acres out of the portion of 63 acres of LR No. 1338/4/R, which was subdivided into various portions with the Defendant portion being 1338/90 which was further subdivided to different parcels of land by the Defendant one of which is now Land Parcel Number 1338/111 and the portion being claimed by the Plaintiff.

c) Costs of this suit with interest thereon.

d) Any other relief that this Honourable Court may deem just to grant.

The Defendant filed a Defence including Counter-claim dated the 28th May, 2015 denying the averments in the Plaint except the descriptive. He admitted entering into two Sale Agreements with the Plaintiff but insisted the same was contingent upon fulfillment of certain terms as well as conditions stipulated therein, which could not be fulfilled by both parties. He explained that both parties agreed that the sale could not be completed due to a consent signed in court stipulating that the suit land could only be leased with the proceeds going to the estate. Further, that they entered into a Lease Agreement dated 15th July, 2003. He reiterated that the property described as LR 1338/4/R is unknown to him and hence the Plaintiff has failed to disclose a reasonable cause of action against him. He further admitted that the Plaintiff has been in possession of the suit land but insisted the said possession is unlawful since the Lease Agreement between the parties lapsed on 1st September, 2011.

In the Counterclaim, the Defendant prayed that:

a) A declaration that Shashikant Patel and/or Pozzolana Stones Limited continued occupation of Land Reference Number 1338/90 Machakos is unlawful and that the same constitutes illegal trespass and as such the Plaintiff should be evicted.

b) The Plaintiff and/or Pozzolana Stones Limited be evicted from the suit parcel of land being Land Reference Number 1338/90 Machakos.

c) That the Plaintiff and/or Pozzolana Stones Limited do pay mesne profits equivalent to rent chargeable and for continued occupation of the property from 1st September, 2011 until the final determination of this suit.

d) Costs and interest thereon.

The Plaintiff filed a reply to Defence and Defence to the Counterclaim where he reiterated the contents in his Complaint and insisted he fulfilled all the terms of the Agreement having deposited the entire purchase price with his advocate as had been agreed by the Parties. Further, that it is the Defendant who breached the terms of the Agreement by failing to deliver the completion documents as had been agreed. He explained that by a further agreement dated the 1st September, 2005, the completion was extended with an additional 90 days and the Defendant sought for more time even after expiration of 120 days. He insisted the Defendant after having received almost the entire purchase price even after the completion period had expired cannot now claim that the Agreement is invalid for failure to comply with the clause on completion. He contended that he is a stranger to the alleged Lease Agreement dated 15th July, 2003 as he never signed it. In response to the Defence of laches, he averred that the Defendant had not suffered any prejudice to afford him such a Defence since he received almost the entire purchase price. Further, that the Defendant's hand is tainted with illegality, fraud, dishonesty and mischief. He stated that the suit was presented within the prescribed time and not statute barred. He explained that the Defendant entered into the Sale Agreement not only in his capacity as the co executor of the estate of Paul Maingey (deceased) but also as a beneficiary of the said estate. Further, that the Defendant had agreed in the said Agreement that probate of the Will had been granted and the estate was free for distribution to the beneficiaries, the Defendant being one of them. He denied failing to complete the transaction.

The Defendant filed a reply to Defence to the Counterclaim by reiterating his averments as per the Defence and Counterclaim. He insisted the Plaintiff is indebted to him for mesne profits which continue to accrue.

The matter proceeded for hearing but it is only the Plaintiff who called two witnesses.

Evidence of the Plaintiff

PW1 John Muinde who is a Senior Superintendent of Police and a Forensic Expert testified that the alleged signature in the Lease Agreement dated the 15th July, 2003 filed by the Defendant, did not belong to the Plaintiff. The Plaintiff as PW2 adopted his two witness statements and testified that he entered into a Sale Agreement dated the 9th July, 2003 with the Defendant, and a further Agreement dated the 1st September, 2005 for the purchase of the suit land. He confirmed depositing the full purchase price with his advocate as had been agreed and took possession of 17.5 acres out of the suit land. It was his testimony that the Defendant despite receiving most of the purchase price had failed to transfer the 17.5 acres to him. Further, that the Defendant failed to deliver the completion documents as had been agreed. He denied signing the Lease Agreement dated the 15th July, 2003 with the Defendant and insisted it is a fraud as he entered into Sale Agreements and not Lease Agreement as claimed. He explained that there is no encumbrance on the suit land as claimed by the Defendant. He further testified that Pozzolana Stones Limited that the Defendant alleges was the one that needed licenses to operate is a different entity from himself. Further, he never informed the Defendant he needed licenses to operate and has been giving the Defendant money to pay for rates including rents. He averred that he had been in occupation of the suit land and greatly developed it. Further, he is ready and willing to finalize the payment of Kshs. 564,900.80/= which money is being held by his advocates once the suit land is transferred to him.

The Plaintiff produced the following documents as exhibits: Forensic Report; Sale Agreement dated 9th July, 2003; Further Sale Agreement dated 1st September, 2005; Various Correspondence; Copies of receipt payments; Copies of the Original Title Deeds and Survey Plan.

Submissions

The Plaintiff in his submissions contended that this suit is not statute barred as claimed by the Defendant as he is enforcing the Sale Agreements dated 9th July, 2003 and 1st September, 2005 respectively. Further, that the transaction between them remained active beyond the stipulated completion dates as parties kept on exchanging correspondence through their respective advocates as the Defendant took a long time to subdivide the suit land to give rise to the 17.5 acres he sold to him. He further submitted that he is entitled to an order of specific performance as per the two Sale Agreements having paid most of the purchase price but the Defendant has declined to transfer the portion purchased to him. Further, that though the two Agreements stipulated the completion period, it was the intention of the parties that completion would only be possible upon finalization of the subdivision process. It was his further submission that the process of subdivision took longer than expected. He reiterates that the remedy for specific performance is hence available to him. Further, that the Defendant's argument that the two agreements were incapable of performance is not valid as he never served him with the 21 days completion notice which completion could only take place after successful subdivision or demarcation of the 17.5 acres that was confirmed to have taken place on 11th June, 2018 by the Vendor's advocate when they stated they were in possession of the Original Deed Plan for plot number 1338/111. He further averred that the intention of the parties was clear and the Counterclaim cannot succeed since the alleged Lease is a forgery. To buttress his averments, he relied on the following decisions: *Diana Katumbi Kioo V Reuben Musyoka Muli (2018) eKLR*; *Charles Karaithe Kiarie & 2 Others V Administrators of the Estate of John Wallace (Deceased) & 5 Others (2013) eKLR*; *Caltex Oil Kenya Limited V Rono Limited (2016) eKLR*; *Sun Sand Dunes Limited V Raiya Construction Limited (2018) eKLR*; *Fidelity Commercial Bank Limited v Kenya Grange Vehicle Industries Limited (2007) eKLR*; *Samuel Ngige Kiarie V Njoramu Construction Company Limited & Another (2019) eKLR*; *National Bank of Kenya V Pipe Plastic Samkolit (K) Limited & Another (2019) eKLR*; and *Adopt A Light Limited V Ochieng Onyango Kibet & Ohaga Advocates (2016) eKLR*.

I note there was no record of the Defendant's submissions in the Court file.

Analysis and Determination

Upon consideration of the Amended Plaintiff, Defence including Counterclaim, Testimonies of the Witnesses, Exhibits and Submissions, the following are the issues for determination:

- *Whether this suit is statute barred.*
- *Whether the Plaintiff is entitled to orders of Specific Performance.*
- *Whether the Defendant is entitled to orders sought in the Counterclaim.*
- *Who should bear the costs of this suit.*

I will deal with all the issues jointly.

The Defendant despite filing his Defence and Counterclaim to deny the Plaintiff's averments as well as claiming the two Sale Agreements had been reduced to a Lease Agreement, failed to call any witnesses to testify to challenge the evidence of the Plaintiff and his witness as well as confirm his assertions. In the case of *Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007*, Ali-Aroni, J. favourable cited with approval the decision in *Edward Muriga through Stanley Muriga vs. Nathaniel D. Schulter Civil Appeal No. 23 of 1997*, where it was held that even if a party filed a Defence but failed to adduce evidence to support the assertions made therein, the evidence of the Plaintiff hence remained uncontroverted.

See also the decisions of *Interchemie EA Limited vs. Nakuru Veterinary Centre Limited Nairobi (Milimani) HCCC No. 165B of 2000*; and *Linus Nganga Kiongo & 3 Others v. Town Council of Kikuyu (2012) eKLR*.

In the circumstances while associating myself with the cited decisions, I find since the Defendant failed to tender evidence to confirm his assertions and support the counterclaim as well as rebut the Plaintiff's averments, the Plaintiff's evidence as well as testimonies of his witnesses remain uncontroverted.

As to whether this suit is statute barred. I wish to refer to section 4(1) (a) of the Limitation of Actions Act which stipulates that:

“(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued-

(a) actions founded on contract;”

In this instance, the Plaintiff and Defendant first entered into a Sale Agreement dated the 9th July, 2003 and a further Sale Agreement dated 1st September, 2005. From the correspondence between their respective advocates, it is evident the transaction was kept alive beyond the completion date as the Defendant was yet to subdivide the 17.5 acres and transfer to the Plaintiff the said portion. Further, the Defendant continued to receive part of the purchase price from the Plaintiff’s advocates at different intervals. It further emerged in the pleadings and evidence that the Plaintiff took possession of the land he had purchased upon entering into the said Sale Agreements. From the letter dated the 20th November, 2014, the Plaintiff sought for the completion documents from the Defendant which he failed to furnish after which this suit was filed in 2015. In the case of *Robert Kiptanui Kitur v Jackson Kiprotich Kitur [2022] eKLR* the Court cited in approval the case of *Diana Katumbi Kiio V Reuben Musyoki Muli [2018] eKLR*, and stated that

“The court agreed with the view that a cause of action in contract arises from breach of the contract, and not at the time the contract is executed. The author in the Journal of International Banking and Financial Law: “What’s the Limit” (2007) 11 JIBFL 642, stated; “In contract the cause of action accrues when the breach occurs, but in tort the cause of action accrues when damage is first sustained. The cause of action, whether in tort or contract, arises regardless of whether or not the claimant could have known about the damage.”

Based on the facts as presented while relying on the legal provisions cited above as well as associating myself with this decision, I find that this suit is not statute barred as claimed by the Defendant as the Plaintiff is in possession of the suit land and cause of action arose on 20th November, 2014 when the Defendant failed to furnish the completion documents to the Plaintiff despite receiving most of the purchase price.

As to whether the Plaintiff is entitled to orders of Specific Performance.

On the prayer for specific performance, I will proceed to highlight various cases in respect to the same. In the case of *Gurdev Singh Birdi & Marinder Singh Gatora vs. Abubakar Madhubuti, where the Court of Appeal in Civil Appeal No. 165 of 1996, held that the underlying principle in granting the equitable relief of specific performance is that, “the Plaintiff must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action”* emphasis mine

While in the case of *Thrift Homes Ltd V. Kenya Investment Ltd 2015 eKLR*, the court stated that;

“Specific performance like any other equitable remedy is discretionary and will be granted on well settled principles. The jurisdiction of specific performance is based on the existence of a valid enforceable contract and will not be ordered if the contract suffers from some defects or mistake or illegality. Even where a contract is valid and enforceable, specific performance will not be ordered where there is an adequate alternative remedy. The court then posed the question as to whether the Plaintiff who was seeking specific performance in that case had shown that he was ready and able to complete the transaction.”

PW2 in his testimony explained that the Plaintiff and the Defendant entered into two Sale Agreements and the Defendant allowed the Plaintiff to take possession of the suit land that he had purchased. In the first Sale Agreement dated 9th July, 2003 for the purchase of 15 acres, the purchase price was Kshs. 6, 750,000. The Plaintiff paid a deposit Kshs. 2, 700,000 which was acknowledged by the Defendant. Further, the balance of Kshs. 4, 050,000/= was deposited with the Plaintiff’s advocate *messrs Anil Joshi & Co. Advocates* and was to be released to the Defendant in 10 days upon registration of the transfer in favour of the Plaintiff and a Certificate of Title issued to that effect. From correspondence dated the 2nd December, 2003 and 29th June, 2004 respectively, which was produced as exhibits, the Defendant’s Advocates informed the Plaintiff’s Advocates that they were in the process of finalizing the subdivision. PW2 explained that on 1st September, 2005, he entered into a second Sale Agreement with the Defendant for the sale of 2.5 acres with the purchase price being Kshs. 1,250,000/=. In the said agreement, the Defendant undertook to expedite the subdivision. It further emerged in evidence that the Defendant deviated in the terms of the Sale Agreements by requesting for payment of remaining purchase price in bits as evident in the correspondence provided as exhibits, culminating in the balance of the purchase price remaining at Kshs. 564,900.80. PW2 testified that the Defendant took long to subdivide LR No. 1338/4/R but promised to deliver the Deed Plan by 31st October, 2006. Further, the distribution of the assets of the estate of Paul Maingey

(deceased) was concluded and the Defendant received his title for his share measuring 63 acres being LR No. 1338/90 but later proceeded to subdivide it, which subdivision was approved on 27th September, 2011. The Plaintiff further testified that one of the sub plots emanating from LR No. 1338/90 was LR No. 1338/111 measuring 17.5 acres, which portion he is in possession of. Further, the Deed Plan for the said land is in possession of messrs Muthoga Gaturu Advocates.

From the evidence highlighted above, I note the total of the purchase price was Kshs. 8,000,000/= out of which the Defendant received Kshs. 7, 435,099.20 leaving a balance of Kshs. 564, 900.80 which is in custody of the Plaintiff's advocate. The Defendant in his Counterclaim insisted the Sale Agreements could not be completed and hence they entered into a Lease Agreement dated 15th July, 2003 with a company called Pozzolane Stones Limited for purposes of mining which Agreement he claimed the Plaintiff signed. PW1 who was a Forensic Expert confirmed in his testimony that the signature appended to the alleged Lease Agreement did not belong to the Plaintiff. From this piece of evidence, I note there was intention of the parties that the completion of the two agreements could only be effected upon finalization of the subdivision which was the responsibility of the Defendant who has now declined to effect the transfer. In the case of *Charles Karaithe Kiarie & 2 Others V Administrators of the Estate of John Wallace (Deceased) & 5 Others (2013) eKLR*, it was held that payment of the purchase price is a condition precedent for specific performance of an agreement for sale of land.

The Court of Appeal in the case of *Peter Mbiru Michuki Vs Samuel Mugo Michuki [2014] eKLR*, stated thus:

“34. In Mwangi & Another vs Mwangi, (1986) KLR 328, it was held that the rights of a person in possession or occupation of land are equitable rights which are binding on the land and the land is subject to those rights..... 35. The dicta in Mwangi & Another Vs Mwangi, (1986) KLR 328, establishes the principle that the rights of a person in possession or occupation of land are equitable rights which are binding on the land.... In the instant case, the plaintiff was in occupation of the suit property and his possessory rights are not only equitable rights but an overriding interest binding on the land. Section 18 of the Limitation of Actions Act provides that subject to Section 20(1), the Act applies to equitable interests in land ... and accordingly a right to action to recover the land ... accrues to a person entitled in possession to such an equitable interest in the like manner and circumstances and on the same date as it would accrue if his interest were a legal estate in the land.

36. It is our considered view that when the appellant entered into a sale agreement with the plaintiff in 1964 and received the purchase price for the suit property, the appellant became a trustee holding the suit property in favour of the plaintiff. The plaintiff having paid the purchase price and taken possession acquired an equitable beneficial interest in the suit property.”

See also the case of *Caltex Oil Kenya Limited V Rono Limited (2016) eKLR and Robert Kiptanui Kitur v Jackson Kiprotich Kitur [2022] eKLR*.

Based on the facts as presented, I find that the Plaintiff had indeed been in possession of the 15 acres of land from 2003 and 2.5 acres from 2005 which makes it 17.5 acres respectively. Further, that the Defendant is indeed in breach of the two Agreements of Sale. I further find that the Lease Agreement dated 15th July, 2003 is a forgery. It is my considered view that the Plaintiff demonstrated through evidence that he had performed all the terms of the contract (the two Sale Agreements) which he was entitled to perform, but it is actually the Defendant who failed to subdivide and effect transfer of the 17.5 acres as had been agreed. I further opine that since the Plaintiff took possession of his 17.5 acres upon purchase and developed it, an element of constructive trust was also created which the Defendant cannot renege on. It is against the foregoing while relying on the abovementioned decisions and also anchoring my determination on the principles enshrined in Articles 2, 4 and 10 of the Constitution in respect to social justice and equity, I find that since the Defendant received most of the purchase price, while the Plaintiff had taken possession of the suit land to safeguard his interest; and the Defendant having failed to tender evidence to controvert the Plaintiff's averments, he is indeed entitled to the orders sought in the Plaintiff.

I further find that the Defendant is not entitled to orders sought in the counterclaim and will dismiss it.

On the issue of costs, since the Plaintiff is the inconvenienced party, he is entitled to costs of this suit.

It is against the foregoing that I find the Plaintiff has proved his case on a balance of probability and will enter judgement in his favour and dismiss the Counterclaim. I will proceed to make the following orders:

i. An order of Specific Performance be and is hereby granted compelling the Defendant to complete the transfer of 17.5 acres out of the 63 acres of LR No. 1338/4/R which was subdivided into various portions with the Defendant portion being LR No. 1338/90 which was further subdivided to different parcels of land by the Defendant one of, which is now Land Parcel Number 1338/111 and to which, the Plaintiff is in occupation, to the Plaintiff.

ii. Failure to undertake (i) above within Ninety (90) days from the date hereof, the Deputy Registrar of the Environment and Land Court, Machakos be and is hereby mandated to execute all necessary documents required to complete the transfers in favour of the Plaintiff including the Land Control Board application in respect of 17.5 acres out of the portion of 63 acres of LR No. 1338/4/R, which was subdivided into various portions with the Defendant portion being 1338/90 which was further subdivided to different parcels of land by the Defendant one of which is now Land Parcel Number 1338/111 and the portion being claimed by the Plaintiff.

iii. Costs of this suit is awarded to the Plaintiff.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 4TH DAY OF APRIL, 2022

CHRISTINE OCHIENG

JUDGE



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