



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELC CASE NO 429 OF 2017

PAUL KIMINJA WAIKWA.....PLAINTIFF

VERSUS

ANN WANGUI WACHIRA.....DEFENDANT

JUDGEMENT

1. The plaintiff in this matter filed his Complaint dated the 26th May 2017 on the same day in which he had sought for judgment to be entered against the Defendant herein for the following orders.

- i. A total of Ksh. 1,809,000/= as particularized in the complaint plus interest from 27th September 2014 until payment in full.
- ii. Costs of the suit plus interest
- iii. Any other relief that this honorable court may deem fit and just to grant.

2. The pleadings as well as summons to Enter Appearance were served upon the Defendant on the 27th June 2017 who accepted service but refused to acknowledge the same by appending her signature thereon.

3. Despite service, the Defendant neither entered appearance nor filed her statement of defence within the stipulated time of 15 days from the date of service. To this effect therein, the Plaintiff's counsel wrote to the Deputy Registrar, Environment and Land Court-Nyahururu, vide a letter dated the 20th July 2017, requesting for judgment to be entered against the Defendant for the sum of Ksh. 1,809,000/= being the principle amount plus interest from 27th September 2014 until payment in full as well as for costs.

4. On the 28th July 2016, the Plaintiff wrote again to the Deputy Registrar requesting to have the matter set down for mention before the honorable judge, to fix a date for formal proof.

5. On 2nd August 2017 the plaintiff's counsel fixed the mention date in the registry for formal proof for the 10th October 2017 on which day counsel appeared before me and elected to have the matter proceed before the court despite its pecuniary value. After satisfying myself that the Defendant had been served and had not filed any papers, judgment was entered against her for the sum of Ksh. 1,809,000/= and the matter was set down for hearing pursuant to the provisions of *Order 10 Rule 9 of the Civil Procedure Rules* as an undefended suit.

6. By the 29th February 2018, when the matter came up for formal proof, the Defendant had still not filed her papers wherein the matter proceeded for hearing with the Plaintiff's case ex-parte.

The Plaintiff's case

7. It was the Plaintiff's case, and while relying on the bundle of documents filed on the 26th May 2017, that he had entered into an agreement with the Defendant on the 27th September 2014, herein produced as Pf Pf Exh 1, herein for the sale of 11 acres of land for a consideration of Ksh. 1,650,000/=, land which was to be excised from land parcel No. Marmanet/North Rumuruti Block 2/661 Ndurumo.

8. That he had been introduced to a surveyor one Mr. Patrick Njau who had demarcated the land at a fee of Ksh 27,000/=. He however was not issued with a receipt for the payment.

9. The Plaintiff testified that after making the agreement, he had paid a down payment of Ksh. 1,000,000/= on the 27th September 2014

through a bank transfer, Pf Exh 2 (a), from his bank to her bank account at Family Bank.

10. That the 2nd payment of Ksh. 200,000/= was made on the 31st December 2014 through a bank transfer Pf Exh 2(b), while the 3rd transfer of Ksh. 300,000/= Pf Exh 2(c) through the same bank transfer was made on the 10th February 2015. The last transfer of Ksh. 150,000/= Pf Exh 2(d) was made on the 31st October 2015.

11. The court upon comparing copies of the said documents with the originals accepted the copies as Pf Exhibits and returned the originals to the Plaintiff for safe keeping.

12. The plaintiff proceeded with his testimony to the effect that after he had finished the payment of the purchase price, he did not take possession of the land, but he engaged one Daniel Kibiru through an agreement dated the 2nd November 2016, Pf Exh 3, to clear the land because he wanted to farm on the same. That he had paid him a total sum of Ksh.132,000/= in three installments of Ksh. 30,000/, on 2nd November 2016, Ksh. 50,000/= on the 27th November 2016 and when he had finished the assignment, the Plaintiff had paid him the balance of Ksh. 52,000/= on the 23rd April 2017. That it was after Daniel had completed clearing the ground and the Plaintiff was ready to make use of the parcel of land that two people started claiming ownership of the land wherein one of the persons immediately fenced the same.

13. The Plaintiff informed the Defendant of what had transpired but when she was indifferent to his concerns, he decided to visit the survey office at Nanyuki where he purchased the Registry Index Map (RIM), Pf Exh 4, survey map of the area. To his surprise he realized that parcel No. 661 did not exist for reasons that on the 6th September 1995, the register was closed upon the subdivision of the said land into smaller parcels of land and was given different numbers.

14. With the new information he confronted the Defendant and demanded to be refunded his money. When she did not respond, he wrote to her a demand notice dated 18th April 2017, produced as Pf Exh 5, which was served upon her by the court process server.

15. The Plaintiff closed his case and sought for the orders as prayed in his plaint.

Determination.

I have carefully considered the Plaintiff's claim against Defendant, the evidence, and the law applicable thereto. I find the matter arising for determination thereto as being whether or not the suit as against the Defendant is sustainable in the law.

16. It is evident that the Defendant herein was served with summons to enter appearance wherein she neither entered appearance nor filed any defence. The Plaintiff's suit is therefore undefended. However, even though the suit was not defended, the Plaintiff still had the duty to formally prove his case on a balance of probability as required by law.

17. The suit was commenced by way of plaint filed on the 26th May 2017. The Plaintiff's claim is that on the 27th September 2014, he purchased 11 Acres of land from the Defendant for a consideration of Ksh. 1,650,000/=, land which was to be excised from land parcel No. Marmanet/North Rumuruti Block 2/661 Ndurumo.

18. His complaint was that after the full payment of the purchase price and after clearing the parcel of land at a cost of Ksh. Ksh.132,000/=, he had discovered that the land parcel No. Marmanet/North Rumuruti Block 2/661 Ndurumo was not in existence after subdivision on 6th September 1995 wherein the register was closed. In this suit, the Plaintiff's claim is for special Damages.

19. It is trite law that special damages must not only be specifically pleaded, they must also be strictly proved with as much particularity as circumstances permit. See **National Social Security Fund Board of Trustees vs Sifa International Limited (2016) eKLR, Macharia & Waiguru vs Muranga Municipal Council & Another (2014) eKLR and Provincial Insurance Co. EA Ltd vs Mordekai Mwanga Nandwa, KSM CACA 179 of 1995 (ur)**. In the latter case the court of Appeal was emphatic that;

“... It is now well settled that special damages need to be specifically pleaded before they can be awarded. Accordingly, none can be awarded for failure to plead. It is equally clear that no general damages may be awarded for breach of contract ”.

20. Order 10 Rule 4 provides as follows :-

(1) Where the plaintiff makes a liquidated demand only and the defendant fails to appear on or before the day fixed in the summons or all the defendants fail so to appear, the court shall, on request in Form No. 13 of Appendix A, enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of the judgment, and costs.

(2) Where the plaintiff makes a liquidated demand together with some other claim, and the defendant fails, or all the defendants fail, to appear as aforesaid, the Court shall, on request in Form No. 13 of Appendix A, enter judgment for the liquidated demand and interest thereon as provided by sub-rule (1) but the award of costs shall await judgment upon such other claim.

21. To prove his case which was uncontroverted, the Plaintiff produced bank transfer receipts amounting to Ksh 1,650,000/= monies which he transferred into the Defendant's bank account as per their agreement, for the purchase of 11 acres of land. It was further the Plaintiff's evidence that he had paid the surveyor Ksh. 27,000/= to demarcate the land, upon which he had not been issued with a receipt. That further, vide a contract agreement, which was produced as evidence, with one Daniel Kibiru, he had paid him (Daniel) Ksh 132,000/= to clear the bushes on the said land. It is against the foregoing that I award the amount of Kshs. KShs. 1,809,000/= as special damages to the Plaintiff as

pleaded.

22. The upshot of this is that this Court is satisfied that the Plaintiff has proved his case against the Defendant on a balance of probabilities. Judgment is entered for the Plaintiff against the Defendant in the following terms:

- i. *Special damages of KShs. 1,809,000/=.*
- ii. *Interest at court rate from 27th September 2014 until payment in full.*
- iii. *Costs of the suit.*

Dated and delivered at Nyahururu this 16th day of October 2018.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE