



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

ELC CASE NO. 423 OF 2013

ROBERT KIPTANUI KITURPLAINTIFF

VERSUS

JACKSON KIPROTICH KITURDEFENDANT

JUDGEMENT

1. The Plaintiff commenced the suit herein through the plaint dated 27th August, 2013 seeking for the following orders:

- a. "An order for specific performance compelling the Defendant to surrender the original certificate of lease in respect of **Eldoret Municipality Block 14/400** to the Plaintiff and to execute transfer and hand over transfer documents to facilitate transfer of the land to the Plaintiff.
- b. An order compelling the Defendant to pay outstanding land rent, rates and other outstanding utility bills in respect of land parcel No. **Eldoret Municipality Block 14/400**.
- c. Costs of and incidental to the suit.
- d. Any other relief this Honourable Court may deem fit and just to grant."

The plaintiff avers that he entered into a Sale Agreement with the defendant over **Eldoret Municipality Block 14/400**, the suit property, for Kshs.1,400,000 on 3rd January, 2007, and paid Kshs.1,000,000 as deposit. That the balance of Kshs.400,000 was agreed to be paid on the 31st August, 2007 upon the defendant paying all the land rates, rent and utilities. That the plaintiff has been in occupation of the suit property since the date of the Sale Agreement, but the defendant has yet to clear the outstanding land rates, rent, utilities and to execute the conveyancing documents.

2. The Defendant opposed the plaintiff's claim through their Statement of Defence dated 3rd October, 2013, in which he among others denied entering into the alleged sale agreement of 3rd January, 2007; receiving the Kshs.1,000,000 as deposit; agreeing to execute conveyancing documents, or that the plaintiff has been in occupation of the suit property. He further averred that any occupation of the suit property by the plaintiff was without his consent and therefore, amounts to trespass. That the signature on the sale agreement attributed to him is a forgery, and in any case the agreement was not attested as required *under Section 3(b) of the Law of Contract Act*. That the said agreement being a contract is unenforceable under the provisions of the Limitation of Actions Act, and the suit should be dismissed with costs.

3. The plaintiff testified as **PW1** and adopted the contents of his two statements as his evidence in chief. He also produced the Sale Agreement, banker's cheque (copy) for kshs.1,000,000 in the name of the defendant, demand letter, banking slip, and Family bank statement showing the bankers cheque was deposited in the defendant's account as exhibits 1 to 5 respectively. He testified that upon entering into the sale agreement, he took possession of the suit land and has been cultivating on it since then. That in 2013 the defendant took one Peter Magut, **PW3**, to the land intending to sell it to him, and that prompted him to file this suit on 30th August, 2013. That he is ready to pay the balance of the purchase price upon the defendant performing his part of the agreement. During cross examination the plaintiff testified that he signed the Sale Agreement on the 3rd January, 2007 while David Limo, PW2, signed on the 8th January, 2007. That after he signed the agreement, he left it with the advocate, and he later found it had been signed by the defendant and stamped by the advocate. That he had left the banker's cheque for the deposit with Terer advocate as directed by the defendant. That the land rates and rent over the suit land were later paid by Peter Magut on the 14th June, 2013 when he wanted to buy the land. The plaintiff called David Kiptanui Limo, Brigadier Peter Magut, and Isaack K. Terer who testified as PW2 to PW4 respectively. **PW2** among others confirmed signing the sale agreement as a witness on the 8th January, 2007. PW3 confirmed that he had entered into a sale agreement over one acre of Block 14/400 at kshs.9,000,000 from Defendant. That he paid land rates of kshs.665,000 that he was to deduct from the purchase price. He also paid the Defendant through Ms. Terer & company advocates kshs.1,000,000, but stopped the transaction upon learning the land had already been bought by the plaintiff. That

he has since been refunded his money and has no claim over the suit land. PW4, an advocate testified that he acted for the defendant when he entered into a land sale agreement over the suit land on 3rd January, 2007. That defendant and PW2 signed the agreement on 8th January, 2007 after which he signed and handed it to him (defendant). He confirmed that the defendant had acknowledged receipt of the banker's cheque of kshs.1,000,000 and according to the defendant's bank statement, it was credited to his account on the 19th March, 2007. That he is still in custody of the original certificate of lease and had declined to release it to PW3. That the sale agreement was prepared by him and is therefore not a forgery as he still has the original. That he had been involved in other transactions concerning the defendant before the instant one. That he had retained a copy of the banker's cheque for the deposit of kshs.1,000,000.00 paid by the plaintiff before handing the original to the defendant.

4. The defendant testified as DW1 and adopted the contents of his statement as his evidence in chief. He denied entering into the sale agreement with the plaintiff and depositing the banker's cheque in his account. He added that the plaintiff and PW4 wanted to take his land. During cross examination the defendant testified that he knew PW2 as a brother-in-law to PW1, and that he is the one who took the title document for the suit property to PW4. He confirmed that kshs.1,000,000 was credited to his account but he did not know by whom. That he made a report about the agreement to the police under on 3rd October 2013, on learning of the transaction in the process of selling the suit land to PW3 for kshs.9,000,000. That he had to sell another land to refund PW3 the amount he had paid to him. That PW4 is not his advocate and is the one who sold the suit land to PW1. That he has gone to school up to class five (5) and can write in Kiswahili and Kalenjin. That his signatures are at times in writing or thumb printed.

5. That upon being moved by counsel for the defendant, the court adjourned the hearing after the defendant's testimony on the 24th November, 2017 for the sale agreement to be examined by a document expert in two weeks. That despite the matter being mentioned and fixed for hearing severally thereafter, no report or expert evidence has been tendered to date. That upon being moved by counsel for the plaintiff on the 26th November, 2020, the court directed the parties to file and exchange written submissions to enable the court proceed to write a judgement. The learned counsel for the plaintiff then filed their written submissions dated the 7th December 2020.

6. The defendant then filed the notice of motion dated the 28th October 2021 seeking for the suit to be struck out with costs for being time barred, among others. The application is supported by the affidavits sworn by the Defendant and one Eunita Jelimo Bor on the 28th October, 2021. The court gave directions on the 3rd November 2021 that replies and written submissions be filed and exchanged for the application to be decided alongside the main suit to avoid further delay in the matter. That consequently the plaintiff filed the replying affidavit sworn on the 16th November 2021 in opposition to the application. The learned counsel for the defendant and plaintiff then filed their written submissions dated the 24th November 2021 and 17th December 2021 respectively.

7. The following are the issues for the court's determinations;

- a. Whether the plaintiff's suit is time barred, or put differently, whether the defendant's application dated 28th October, 2021 has merit.
- b. Whether the Plaintiff is entitled to an order of specific performance.
- c. Who pays the costs.

8. The court has considered the grounds on the notice of motion dated the 28th October, 2021, the affidavit evidence filed for and against the said application, the pleadings by both parties, evidence tendered by PW1 to PW4 and DW1, submissions filed by the learned counsel for the parties and come to the following determinations;

- a. That starting with the defendant's application in which he seeks for an order to have the plaintiff's suit struck out with costs on the grounds that the action is founded on contract and may not be brought to court after the end of six (6) years from the date on which the cause of action accrued, it is important to note that the Plaintiff's main prayer in the suit is for an order of specific performance in respect of the Sale Agreement dated 3rd January, 2007. That paragraph 5 of the Sale Agreement dated 3rd January, 2007 provides as follows:

“The parties hereby agree that the said parcel of land is sold to the purchaser free of any encumbrances save for those expressly referred to in this agreement and which must be cleared by the vendor and clearances therefore obtained in any event before the payment of the balance of the purchase consideration and in any event not later than 31st August,2007”.

The plain reading of the above paragraph shows that though the agreement is dated the 3rd January, 2007, the time for purposes of limitation was not 3rd January, 2007, but in the future, when any of the parties breaches the terms of the sale agreement.

- b. The sale agreement herein was executed on 3rd January, 2007 and a sum of Kshs.1,000,000.00 was advanced to the Defendant by a Bankers Cheque dated 3rd January, 2007. The Defendant was required to obtain the rates and rent clearance certificates by 31st August, 2007 and the Plaintiff was to pay the outstanding consideration amount of Kshs.400,000 to the Defendant once the clearance certificates were availed to him. That considering that the evidence presented has confirmed that the outstanding land rates and rent were not paid until the 8th July, 2013, when PW3 cleared them, the court is of the view that the cause of action in this claim may be taken to have arisen on 31st August, 2007 when the Defendant failed to comply with the paragraph 5 of the sale agreement, or the date the payment of the land rent and rates on the 8th July 2013 was brought to the Plaintiff's notice. I take cognisance of the fact that the rates and rent clearances were obtained by one Peter Magut, PW3, who was in the process of purchasing the suit land from the defendant but stopped the deal when he realized that it had already been sold to the Plaintiff herein in the year 2007.

c. That in the case of **DIANA KATUMBI KIIO V REUBEN MUSYOKI MULI [2018] eKLR**, 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.”

The in view of the foregoing I am in agreement with the Plaintiff’s submissions that his claim does not fall within the confines of *Section 4(1)(a) of the Limitation of Actions Act, Chapter 22 of Laws of Kenya* but under the provisions of *Section 7 of the said Act*.

d. That other than the defendant’s assertion that the plaintiff is not in occupation of the suit property, no evidence has been tendered to rebut the plaintiff testimony that he indeed took possession of the said land pursuant to the sale agreement of 3rd January, 2007. That it is common knowledge that a party who executes an agreement in land and takes possession thereof acquires an equitable interest which is protected by law. The Court of Appeal in the case of **PETER MBIRI MICHUKI VS SAMUEL MUGO MICHUKI [2014] eKLR** pronounced itself as follows;

“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.”

That from the evidence tendered, the Plaintiff took possession of the suit property upon paying the deposit of the purchase price in accordance with their sale agreement, and is entitled therefore entitled to the equitable rights over the said land.

e. That while the parties’ relationship started under the sale agreement of 3rd January, 2007, the defendant’s application and submissions that the suit is time barred by dint of the provisions of *Section 4(1) of the Limitation of Actions Act*, is off the mark as the transaction in issue is not merely contractual, as the proprietary rights over the suit land is the crux of the Plaintiff’s claim. That the court agrees with the Plaintiff’s position that his claim is not founded on contract law, and therefore not time barred under the provision of section 4(1) of the Limitation of Actions Act. In the case of **HEBISIABAH MORAA ONDIEKI & 3 OTHERS V EDWARD O. OKUL & ANOTHER [2021] eKLR** the court held as follows:

“The Defendants submitted the plaintiffs’ action was statute barred by reason of limitation of actions by virtue of section 4 of the Limitation of Actions Act as the suit was not brought within 6 years of the making of the agreement for sale. As I observed earlier in this judgment, the plaintiffs’ suit is not founded on contract but rather on possession. Section 4 (1) (a) of the Limitation of Actions Act in the premises has no application.”

The plaintiff’s claim falls within the provisions of Section 7 of the Limitation of Actions Act, and section 4(1)(a) of the Limitation of Actions Act has no application in this matter. That in the case of **DIANA KATUMBI KIIO Vs. REUBEN MUSYOKI MULI [2018] eKLR** the Court of Appeal was required to make a determination whether an agreement for sale of land gives rise to a cause of action for recovery of the land, or a cause of action in contract, and held that it gives rise to a cause of action for recovery of the land. That the foregoing shows that the Defendant’s application dated 28th October, 2021 is without merit and is hereby dismissed with costs.

f. The suit land herein, **Eldoret Municipality Block 14/400**, is in the name of the Defendant. The Plaintiff claims that for a consideration of Kshs.1,400,000.00, he agreed to purchase the suit land from the Defendant, vide their sale agreement dated the 3rd January 2007. The Plaintiff advanced a sum of Kshs.1,000,000.00 to the Defendant vide bankers’ cheque purchased in favour of the Defendant in part payment of the consideration amount. The outstanding consideration amount of Kshs.400,000.00 was to be paid by 31st August, 2007 on condition that the Defendant furnishes him with the rent and rates clearances. The Plaintiff claims that his filing of the instant claim was necessitated by the fact that the Defendant attempted to the sell the suit land to one Peter Magut, PW3, in the year 2013. The evidence by the plaintiff that he had paid the defendant the kshs.1,000,000.00 in the form of a Bankers cheque was corroborated by PW2 and PW4. That PW4 further confirmed that he drafted the sale agreement dated 3rd January 2007 between the plaintiff and defendant, and also witnessed its execution by both parties. PW 4 testified further that the Defendant handed over the original title deed to the suit land to their firm, Terer and Company Advocates. That later PW 3 approached him with an offer to have the original suit land title document released to him upon refunding the sum of Kshs.1,000,000, but he declined. That clearly puts the defendant’s claim that PW4 was not acting for him in the transaction, and that he never gave him the title to the suit land in serious doubts.

g. That though the Defendant has alleged that the sale agreement dated 3rd January, 2007 was fraudulent and that his signature was forged, he has not furnished the court with any evidence in support of his allegations as required of him under *Section 107 of Evidence Act Chapter 80 of Laws of Kenya*. That in any case, PW 4 has testified that the Plaintiff issued a bankers' cheque for Kshs.1,000,000.00 that he forwarded to the Defendant. The Plaintiff produced a deposit receipt and a bank document confirming that the bankers' cheque was deposited and credited into the Defendant's bank account in Family Bank. The defendant claim that he does not know how that cheque was deposited and credited to his account is unbelievable, considering that PW3 later offered to refund a similar amount through PW4 so as to have the original title document released to him, to enable him and the defendant transact over the suit land. That there is no evidence that the defendant reported to the bank or the police to investigate on the banker's cheque being deposited and credited in his account leads the court to conclude that the aforesaid cheque was issued by the Plaintiff to him in part payment of the consideration amount for the purchase of the suit land.

h. That from the record, it is not clear whether the Plaintiff has paid the outstanding consideration amount of Kshs.400,000.00 to the Defendant. During cross examination he made reference to a bankers' cheque for the aforementioned outstanding amount, but he neither produced a copy of the cheque nor a copy of a bank statement confirming that it had been deposited and credited in the Defendant's account. The position the court takes is that the kshs.400,000.00 has not been received by the defendant in view of the plaintiff's testimony during cross examination that he is willing to pay the outstanding consideration upon receipt of the rates and rent clearances from the defendant.

i. That in full appreciation of the fact that the payment of the outstanding amount of Kshs.400,000.00 depended on the Defendant's payment of the land rates and rent which remained unpaid until the year 2013, the question that begs to be answered is whether or not the court should grant the order of specific performance sought by the Plaintiff. In the case of **GODFREY NGATIA NJOROGE V JAMES NDUNGU MUNGAI [2019] eKLR**, the court discussed at length the factors that need to be considered before an order of specific performance is issued as follows:

- i. Whether the sale agreement relied on meets the requirements of Section 3(3) of the Law of Contract Act in that it is in writing and both parties have signed the contract. It must also outline the names of the parties, description of the property, purchase price and the conditions of the sale; and
- ii. Whether the case as advanced has merit and whether there is an adequate alternative remedy to the order of specific performance which is a discretionary order.

That throughout the hearing of this matter, the Defendant disowned the sale agreement dated 3rd January 2007. He further denied appending his signature on the said sale agreement and alleged fraud on the part of the Plaintiff and PW4. Interestingly, the Defendant admits that Kshs.1,000,000.00 was credited in his account, but went on to claim that the amount was not part payment of the consideration for the sale of the suit land from the Plaintiff. It is worth noting that the threshold for proving fraud is higher than a balance of probabilities, but less than that for criminal cases which is said to be beyond reasonable doubt. The Defendant did not plead and provide particulars or furnish any evidence to substantiate the allegations of fraud, even after being given numerous opportunities by the court to do so. The evidence presented has confirmed that the Defendant was represented by the firm of Terer and Company Advocates in the sale transaction with the plaintiff. That Mr. Isaack K. Terer from the said firm, testified as PW4 and confirmed the authenticity of the sale agreement. He further confirmed that he refused to hand over the original title deed entrusted to him under the transaction to PW3, for he knew the suit land had already been sold to the Plaintiff herein. PW3 also testified that when he became aware of the Plaintiff's claim to the suit land, he notified the Defendant of the impediment. That in the circumstances, I find the defendant's attempt to disown the sale agreement dated 3rd January, 2007 must fail. The said sale agreement is therefore valid and enforceable.

j. That in the case of **NELSON KIVUVANI VS. YUDA KOMORA & ANOTHER, NAIROBI HCCC NO.956 OF 1991**, the court held that:

“The agreement for sale of land which contains the names of the parties, the number of the property, the purchase price and the conditions attached thereto, the obligations, express or implied, of each of the parties and signed and witnessed by two witnesses who signed against their names amount to a valid contract”.

And in the case of **RELIABLE ELECTRICAL ENGINEERS (K) LTD Vs MANTRAC KENYA LIMITED [2006] eKLR**, the court held as follows:

“The jurisdiction of specific performance is based on the existence of a valid, enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or unenforceable. Even where a contract is valid and enforceable specific performance will, however, not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even where damages are not an adequate remedy specific performance may still be refused on the ground of undue influence or where it will cause severe hardship to the defendant.”

The subject matter of the suit herein is land and the court takes judicial notice of the fact that land appreciates in value over time. That in the year 2007, the suit land was being purchased for Kshs.1,400,000.00 and when PW3 was buying the same land in 2013 the purchase price was Kshs.9,000,000. That when the Plaintiff testified about nine (9) years after the sale agreement in 2016, he gave its estimated value as Kshs.15,000,000.00 or more. That estimate has not been challenged by the defendant and in the circumstances, I find there is no adequate alternative remedy available to the Plaintiff other than an order of specific performance sought in this case.

k. That Section 27 of the Civil Procedure Act chapter 21 of Laws of Kenya provides that costs should follow the event unless where good cause has been shown to enable the court order otherwise. That the plaintiff having shown that he was always prepared to pay the balance of the purchase price upon receipt of the rates and rent clearances, which the defendant has to date not provided to him, and as he is successful in the claim, he is entitled to costs.

9. That the court finds the plaintiff has proved his claim against the defendant in accordance with the law. The court therefore enters judgement for the plaintiff against the defendant in the following terms:

a. That an order of specific performance is hereby issued compelling the Defendant to surrender the original certificate of lease in respect of **Eldoret Municipality Block 14/400**, and to execute the transfer documents and hand over the said documents to the plaintiff to facilitate transfer of the land to the Plaintiff, upon the plaintiff paying the balance of the purchase price amounting to kshs,400,000.00 to the defendant as final settlement under the sale agreement dated 3rd January 2007.

b. That should the defendant decline to receive the balance of the purchase price of kshs.400,000.00, the plaintiff be at liberty to deposit the said amount with the court, for onwards transmission to the defendant.

c. That should the defendant decline to execute the documents required to give effect to (a) above, the same be signed by the Deputy Registrar of the court, upon being satisfied that the balance of the purchase price has been paid to the defendant or deposited with the court for onward transmission.

d. The defendant to pay the costs of the suit.

Orders accordingly.

DATED AND VIRTUALLY DELIVERED THIS 9TH DAY OF FEBRUARY, 2022

S. M. KIBUNJA,J.

ELC ELDORET.

IN THE VIRTUAL PRESENCE OF;

1. PLAINTIFF : Absent

2. DEFENDANT: Absent

3. COUNSEL: -Mr Yego for the Plaintiff and

-Mr. Korir for the Defendant

ONIALA: COURT ASSISTANT

S. M. KIBUNJA,J.

ELC ELDORET