



**Kweri v Kamau (Environment & Land Case 100 of 2017)  
[2023] KEELC 17160 (KLR) (27 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 17160 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE 100 OF 2017**

**JG KEMEI, J**

**APRIL 27, 2023**

**BETWEEN**

**JOSEPH KARIUKI KWERI ..... PLAINTIFF**

**AND**

**RUTH MURUGI KAMAU ..... DEFENDANT**

**JUDGMENT**

1. This suit formerly Nyeri ELC No 263 of 2016 was instituted by the Plaintiff vide a Plaint dated December 1, 2016. Upon establishment of this Court, the file was transferred to this Court and renumbered Thika ELC No 100 of 2017.
2. The Plaintiff with leave amended the Plaint on 5/3/2019 averred that on December 5, 2014 he entered into a sale agreement with the Defendant and her late husband Samuel Njoroge Kamano for purchase of land parcel No Thika Municipality Block 6/703 (hereinafter the suit land) at an agreed price of Kshs 2.1M. That on the same day, the Plaintiff paid a deposit of Kshs 1.5M vide bankers' cheques with the balance of Kshs 600,000/- being payable within 90 days. The Plaintiff accuses the Defendant for refusing/neglecting to accept the aforesaid balance and thereafter transfer the suit land in his favor thus breaching the sale agreement. That it was a special condition in the sale agreement that a defaulting party would pay the innocent party 20% of the consideration as liquidated damages.
3. The Plaintiff thus prays for orders of specific performance of transfer of the suit land in his favor and/or in the alternative a refund of the sum of Kshs 2,010,000/= as pleaded in para. 8 of the amended Plaint together with costs of the suit and interest.
4. The Defendant filed her statement of defence dated February 21, 2017. She disputed the Plaintiff's claim over the suit land and stated that the suit land was not registered at the land office but same was denoted by a certificate namely Thika Mwalimu Housing Co-operative Society Ltd number 0000194 and reflected as plot No 040. That indeed the parties entered into a sale agreement as claimed by the



Plaintiff save that the suit land was registered in her late husband's name, she denied the particulars of breach levelled against her and put the Plaintiff to strict proof and maintained that the agreement was frustrated by an Act of God after her husband's demise. She similarly accused the Plaintiff for breaching the sale agreement by failing to pay the balance within 90 days as agreed, failing to attend the offices of Mwalimu Cooperative for onward transfer of the suit land thus the sale agreement cannot be enforced.

5. In a rejoinder, the Plaintiff filed a Reply to Defence dated April 24, 2017 and admitted that at the time of entering the sale agreement that land was registered as Plot 040 at Thika Mwalimu Housing Co-operative Society Ltd and known as Thika Municipality Block 6/703. He denied paras. 5,6,7,8 & 9 of the defence and contended that he has always been ready and willing to pay the balance of Kshs 600,000/- and went further to deposit it in the firm of Karanja Kangiri & Co. Advocates but the Defendant has refused to collect it.
6. Before the matter was set down for hearing on June 23, 2022, parties had attempted negotiations to settle the matter out of Court but the same bore no fruit. Before the hearing the Defendant's Counsel sought to have the Application dated May 13, 2022 be heard first which proposal was objected to by the Plaintiff's Counsel.
7. This Hon Court directed that the Application be canvassed in the parties' final submissions alongside the main suit. The Application seeks in the main striking out of the plaint dated December 1, 2016 for being scandalous, vexatious and an abuse of Court process.
8. The Application is opposed vide the Plaintiff's Replying Affidavit sworn on May 23, 2022. He averred that he has always been ready and willing to prosecute his suit save for the settlement negotiations at the behest of the Defendant's Counsel. That it was surprising instead of offering a settlement, the Defendant opted to file the said Application. That be that as it may, at the time of filing the suit, the suit land was lease hold title and therefore not subject to provisions of the [Land Control Act](#).

### **The Evidence**

9. Prosecuting his case, the Plaintiff Joseph Kariuki Kweri testified as PW1. He relied on his witness statement and further statement dated December 1, 2016 and July 30, 2020 respectively as his evidence in chief. He also produced documents in the List of Documents dated December 1, 2016 as Pex 1 - 7 ie copy of sale agreement dated December 5, 2014, copies of the suit land certificate of ownership, demand letter, bankers' cheques, letter dated August 15, 2016, receipt for legal fees and Grant of Letters of Administration.
10. At the risk of avoiding the repetition of facts, PW1's evidence was a replica of the averments in the plaint already enumerated at paras. 6 & 7 above. In his further statement, PW1 informed the Court that the Defendant is now the legal administrator of her husband's estate and she is thus sued in both her own capacity and that of a legal administrator. PW1 added that he deposited his cheque for Kshs 600,000/- with the parties' Counsel in the sale agreement Karanja Kangiri Advocates and denied failing to complete the transaction. That he then learnt that Kamano had passed on but the title deed was in the couple's names having been issued on May 13, 2016. PW1 then proceeded to lodge a caution over the suit land upon realizing that the Defendant was trying to sell the suit land to another person.
11. In cross, PW1 admitted that he bought the suit land which was under Mwalimu Sacco at which time it was solely allocated under Kamano's name and contended that the Defendant was properly sued in her personal capacity as they jointly entered the sale agreement with him. That he had not paid the balance of the purchase price because he had not been given the title documents; he had also not obtained consent from Kiambu County Government and that PW1 paid the Defendant on instructions of the vendor.



12. PW2 – Joseph Kamau Mwangi, a land broker relied on his witness statement dated May 29, 2017 and testified that he knew the couple who wished to sell the suit land and introduced them to the Plaintiff. PW2 confirmed that Karanja Kangiri Advocates drew the sale agreement and PW1 paid the deposit of Kshs 1.5M. That before Kamano’s demise, he continually updated the parties on the processing of the title deed and urged PW1 not to pay the balance of Kshs 600,000/- until the process was completed. That after Kamano’s burial, Karanja Kangiri Advocates asked PW1 to pay the said balance and called the Defendant to collect the same but he was surprised to learn that the Defendant again wanted to sell the suit land to another party.
13. In cross, PW2 said he was not paid commission for the instant transaction; he did not witness the sale agreement and further he had no license to conduct land brokerage business.
14. On the other hand, the Defendant Ruth Murugi Kamau solely took the stand as DW1. She admitted knowing the Plaintiff and informed the Court that the suit land was allocated to her late husband who passed away in 2015. That her late husband held a share certificate and ballot paper from Mwalimu Sacco. She contested her capacity to be sued and averred that she was not a party in the sale agreement. She also admitted receiving the sum of Kshs 1.5M on behalf of her husband.
15. DW2 relied on her WS dated 21/22017 as evidence in chief and produced documents in List of Documents filed on February 21, 2017 and July 15, 2020 as Dex 1 - 4 namely; copies of Kamano’s death certificate issued on 14/8/2015; Summons for Confirmation of Grant; Grant of Letters of Administration and Certificate of Lease in respect of Thika Municipality Block 6/703 issued on May 13, 2016.
16. In cross, DW1 conceded that she was a co-vendor in the impugned sale agreement. That her husband died while pursuing the suit land title deed which was finally issued on May 13, 2016 but was emphatic that she had never seen it. She confirmed being the administrator of her late husband estate but stated that she was not aware of her duties in that respect as administrator. She denied receiving the letter dated August 15, 2016 and demanding the balance of the purchase price. DW1 said she had not written any letter to terminate the agreement but added she had no intention to transfer the suit land to the Plaintiff as she did not have the title documents. That she did not know the value of the land despite having a confirmed Grant in her name.

### **Written Submissions**

17. Parties elected to file their final submissions for which the Court has read and considered.
18. The firm of Jesse Kariuki & Co Advocates filed submissions dated November 29, 2022 on behalf of the Plaintiff whilst the Defendant through the firm of TM Njoroge & Co Advocates filed submissions dated January 26, 2023
19. The Plaintiff drew two issues for determination; whether there was a valid sale agreement between the Plaintiff and the Defendant and whether the Plaintiff is entitled to the Order of specific performance as prayed. It was submitted that the Defendant has not disputed entering into a sale agreement dated December 5, 2104 alongside her late husband for sale of the suit land. That the purchase price is also admitted at Kshs 2.1M out of which the Defendant confirms receipt of Kshs 1.5M and the balance of the purchase price to be paid as agreed in the terms of the Agreement. That further the Defendant admits the delay in processing of the title documents in the guise of mourning her late husband despite being offered the balance of Kshs 600,000/-. That accordingly it is clear that there is a valid, binding and enforceable contract between the parties and the Plaintiff has not occasioned any breach on his part, instead he has been willing and ready to pay the balance.



20. On the second issue, the Plaintiff was emphatic that he seeks in the main an order of specific performance having paid substantial amount of the purchase price and deposited the balance with the Defendant's Advocates. That having demonstrated there is a valid and enforceable contract devoid of any defects, the Plaintiff is entitled to specific performance as prayed in the amended Plaint as well as an order for costs. Reliance was placed on the cases of *George Ngenga Kagai v Samuel Kabi Njoroge & Anor*. [2019] eKLR and *Joseph Anami Ngaira v Catherine Khakasa Cheng'oli* [2022] eKLR on the applicable conditions for a Party to satisfy in seeking specific performance and the basis for Court to grant the same.
21. The Defendant briefly submitted that the Plaintiff has failed to prove his case on a balance of probabilities. That right from the onset he wrongly sued the Defendant despite not entering the agreement with her; that the Plaintiff failed to exercise due diligence and the monies paid if at all, are not recoverable as the claim has been caught up by limitation. That the Advocate who drew the sale agreement did not attend Court to testify and produce the agreement, which the Defendant vehemently objected to its production. The totality of the Defendant's submissions was that the Plaintiff's case should fail with costs.

### **Analysis & determination**

22. Was there a valid agreement between the parties? The starting point is the agreement of sale dated the December 5, 2014 entered into between the Plaintiff as the buyer and the Defendant and her deceased husband as the sellers. The suit property is described as Thika Mun Block 6 /703. The purchase price was Kshs 2.1 M out of which the deposit of Kshs 1.5 M was paid and the balance of Kshs 600,000/- was payable on or before the expiry of 90 days and subject to the vendors signing all the completion documents in favour of the Plaintiff.
23. At para 8 of the sale agreement the parties anticipated events of default and provided that in the event of default the party in breach shall pay the aggrieved party 20% of the consideration as liquidated damages.
24. It is the Defendant's case that she has been sued wrongly and that the suit should be struck out.
25. Interestingly in her Supporting Affidavit sworn on the May 13, 2022 the Defendant admitted that she is the legal representative of the estate of her deceased husband. See the grant dated November 21, 2016. That being the case she is therefore the right person to be sued in this case.
26. The second reason why her defence must fail is because the Defendant was registered as a co-owner of the suit land as per the title issued on the May 18, 2016. Even going by the doctrine of survivorship, it follows that after the death of her husband she is the sole owner of the suit land.
27. Thirdly she executed the agreement of sale dated the December 5, 2014 as the co- seller of the land following the death of her husband she is legally entitled to continue the obligations as an owner of the suit land.
28. Fourthly the monies via cheques on record were paid in her name, a fact that she has not rebutted.
29. Whether the Plaintiff is entitled to specific performance, it is not disputed that there is a valid agreement of sale on record. It is not disputed that the parties did not complete the transaction within 90 days. None of the parties rescinded or sought to terminate the agreement but by conduct the parties continued to accommodate each other all along. According to the Plaintiff he was waiting for the completion documents to pay the balance of the purchase price. The Defendant led evidence and stated that she was still mourning her husband and needed time to revert to the transaction. Interalia that the title processing took time from Thika Mwalimu Housing Co-operative Society Limited and that the



Plaintiff failed to pay the full purchase price for whatever reason the parties continued accommodation and acquiesced to the deposit.

30. From the above I find that there is still a valid agreement between the parties.
31. The Plaintiff led evidence that he paid the balance of the purchase price to the Defendant vide a cheque dated the May 12, 2015 through Karanja Kangiri Advocates and a letter drawn by the said firm dated the August 15, 2016 addressed to the Defendant asking her to collect the cheque was exhibited. This was not challenged in evidence. The import of this is that the Plaintiff was willing and ready to complete the transaction as per the agreement of the parties. In the said letter the lawyers called for the completion documents.
32. I find that this is a case where a Court of equity cannot allow the Defendant to keep the land and the money at the same time. I find that the Plaintiff is deserving of the equitable remedy of specific performance.
33. Having determined the suit on its merits, I find that the Defendant's Notice of Motion dated May 13, 2022 is unmerited and it is hereby dismissed.
34. Final orders
  - a. The Defendant is hereby ordered to transfer the suit land to the Plaintiff subject to payment of Kshs 600,000/- by the Plaintiff to the Defendant.
  - b. In default the Deputy Registrar is ordered to execute all necessary documents to effectuate the above orders.
  - c. Costs shall be in favour of the Plaintiff.
35. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 27<sup>TH</sup> DAY OF APRIL, 2023  
VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

Delivered online in the presence of;

Jesse Kariuki for Plaintiff

Defendant – Absent

Court Assistants – Kevin/Lilian

