



Iregi v Mungai t/a Okoa Development Co Ltd (Environment & Land Case 171 of 2017) [2023] KEELC 17960 (KLR) (31 May 2023) (Judgment)

Neutral citation: [2023] KEELC 17960 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 171 OF 2017
A NYUKURI, J
MAY 31, 2023
(FORMERLY NAIROBI CIVIL SUIT NO. 4693 OF 2015)**

BETWEEN

PATRICK NJUGUNA IREGI PLAINTIFF

AND

**MOSES NDUNGU MUNGAI T/A OKOA DEVELOPMENT CO
LTD DEFENDANT**

JUDGMENT

Introduction

1. By a plaint dated 11th August 2017, the Plaintiff sought against the Defendant the following orders;
 - a. An order of this Honourable Court compelling the Defendant to transfer to the Plaintiff the said 5 plots each measuring 40 x 80 feet out of that parcel of land known as Mavoko Town Block 2/49, or portion of land out of the same equivalent to the acreage of the said plots combined.
 - b. Any other or relief this Honourable Court may deem fit to grant.
 - c. Costs of this suit.
2. The Plaintiff averred that he had brought this suit on his behalf and on behalf of the estate of Stephen Njuguna Iregi alias Stephen Iregi Njuguna (now deceased), pursuant to a grant of letters of administration issued in Succession Cause No. 527 of 2007. He averred further that the Defendant was the beneficial legal and or registered owner of the parcel of land known as Mavoko Town Block 2/49 (suit property).
3. He stated that in 1995, the Defendant sold five (5) plots each measuring 40 feet by 80 feet being Plot Numbers 450, 451, 452, 453 and 454 out of the suit property, which properties the Defendant was



in the process of buying from its original registered owner. That there was a mutual understanding that the Defendant would obtain registration of the suit property from the original owner and transfer the purchased Plots to the deceased. That however, the deceased passed on before the process was completed although the Defendant had issued him with ownership and beacon certificates of the suit property.

4. The Plaintiff further stated that the Defendant breached the agreement with the deceased by his failure to transfer the suit property to the deceased and has continued in the said breach by failure to transfer the suit property to the Plaintiff who is the administrator of the deceased's estate.
5. The Defendant entered appearance and filed defence dated 7th December 2015. The Defendant admitted owning the suit property and stated that there is a balance of Kshs. 650,000/- which was the reason why the Defendant did not transfer the suit property to the deceased.

Plaintiff's Evidenc

6. PW1, was Patrick Njuguna Iregi, the Plaintiff herein. He adopted his witness statement dated 11th August 2015 as his evidence in chief. It was his testimony that he was the administrator of the estate of Stephen Njuguna Iregi (deceased). He testified that the Defendant was the reputed, beneficial, legal and/or registered owner of the suit property and in 1995, he sold 5 plots, namely Nos. 450, 451, 452, 453 and 454 each measuring 40 feet by 80 feet to the deceased. That the sold plots were hived from the suit property.
7. He informed court that at the time of the sale, the Defendant was in the process of buying the suit property from the original registered proprietor and it was agreed that once the Defendant obtains transfer of the suit property, he would transfer the purchased portion to the deceased.
8. According to PW1, the deceased had paid the agreed purchase price for the five plots and the Defendant had issued him with both ownership and beacon certificates. He testified that the Defendant breached the agreement by failing to transfer the land to the deceased. He produced documents on the list of documents filed on 14th August 2015. These were grant of letters of Administration ad litem, five ownership certificates from Okoa Development Company, two receipts from Okoa Development Company to the deceased in the sum of Kshs. 97,700/- and Kshs. 15,000/- respectively, and a schedule reflecting contributions by the deceased.
9. On cross-examination, PW1 stated that the deceased bought five plots and that each plot was bought at Kshs. 15,500/-. He stated that the balance was nil as demonstrated in the card he produced. He stated that the receipt dated 14th August 1995 for Kshs. 97,700/- was for payment in respect of plots 154, 155, 158 and 159. He testified that although the plot numbers were different from what he had stated earlier, it referred to the same land. His testimony was that the sum of Kshs. 97,700/- was all inclusive, including survey fees. He maintained that numbers changed when ownership certificates were issued. He stated that the receipt No. 9653 explains the narration. That marked the close of the Plaintiff's case.

Defendant's Evidence

10. DW1, was Gabriel Ngugi Ndungu. He adopted his witness statement dated 7th December 2015 as his testimony in chief. It was his evidence that he was an employee of Okoa Development Company Limited as a Manager and that he was conversant with everything that happens at that company. He testified that Stephen Iregi Njuguna had bought the suit property but had an outstanding balance of Kshs. 650,000/- and that the same has never been paid. He testified that the administrators of the deceased's estate were obligated to pay the balance before the transfer process could be done. According



to the witness, a balance of Kshs. 13,000/- for title deed fee was not paid. He conceded that the price per plot was Kshs. 15,500/- and registration fee was Kshs. 200 for all the five plots.

11. The witness testified that for the five plots, the cost was Kshs. 77,500/-. He also stated that the deceased paid survey fees of Kshs. 4,000/- per a plot making it a total of Kshs. 20,000/-. He also stated that the total was Kshs. 97,500/- plus registration fees of Kshs. 200/- making a total of Kshs. 97,700/-. DW1 informed court that upon that payment, the purchaser was to pay for the title deeds. According to DW1, the Plaintiff paid Kshs. 15,000/- for title deeds and left a balance of Kshs. 13,000/- as the cost of each title was Kshs. 5,600/-. He further stated that the deceased was supposed to pay for legal and transfer fee of Kshs. 97,000/- per plot. He testified that he did not finish paying for his title deed fee and had not began paying legal and transfer fee, amounting to Kshs. 650,000/- less a sum of Kshs. 15,000/- that was paid leaving a balance of Kshs. 635,000/-. He stated that he had not transferred the title to the Plaintiff because of that balance. He stated that ownership certificates were altered in the Plot No. and L.R. No. He stated that the plots stated by the Plaintiff are not in existence. He stated that if the Plaintiff paid the balance, he will transfer the five plots to him. That marked the close of the Defence case.
12. Parties were directed to file submissions. On record are the Defendant's submissions filed on 29th May 2022.

Submissions

13. Counsel for the Defendant submitted that the Plaintiff failed to produce evidence to prove that the deceased paid for the whole amount for the title deed and legal and transfer fees to have the suit property transferred to him. Counsel pointed out that beacon certificates were not part of the documents produced by the Plaintiff which is evidence that the Plaintiff had not paid all the outstanding balance. Counsel argued that the Plaintiff failed to produce original receipt for receipt dated 14th August 1995. They submitted that therefore the sum of Kshs. 97,700/- was not paid. Counsel argued that the defence had proved that the deceased had an outstanding balance of Kshs. 635,000/-. According to counsel, the defence witness was honest in stating that the Plots in issue were not available and that they can give alternative plots on condition that the outstanding balance is paid. They urged the court to dismiss the Plaintiff's case.

Analysis and Determination

14. I have carefully considered the pleadings, evidence and submissions. In my considered view, the issue that arise for determination is whether the Plaintiff is entitled to an order of specific performance.
15. There are settled principles governing grant of relief of specific performance. In the case of *Amina Abdul Kadir Hawa v. Rabinder Natu Anand & Another* [2012] eKLR, the court held that for an order of specific performance to issue, the Applicant must meet the following parameters;
 - a. The remedy is an equitable remedy meaning that the court has to satisfy itself that on the facts presented to it, it is equitable in the interests of both parties to grant the reliefs.
 - b. It is available where damages will not be an adequate compensation meaning that if damages are adequate, even if all the other prerequisites have been met and favour the granting of the relieve of specific performance the court can withhold it and award damages instead.
 - c. It is a discretionary relief which discretion should not be exercised arbitrary but on the basis of applicable principles. The guiding principles applicable to the court's exercise of its discretion



which is trite and which this court has judicial notice of is that the discretion has to be exercised judiciously with a reason.

- d. Even if the facts of the case demonstrate that specific performance is a proper remedy to grant in the circumstances, it may nonetheless be withheld in circumstances when it is likely to cause hardship to the Defendant even if circumstances giving rise to the hardship to be suffered by the Defendant were not contributed to by the contracting parties and may have arisen even after the conclusion of the contract.
 - e. The party entitled to earn the relief has to demonstrate that he/she has fulfilled all his/her obligations under the terms of the contract. Or alternatively, that there is demonstrated proof that he/she is ready and willing to fulfil the same.
16. Essentially, where a Claimant has complied with their part of the bargain, and the circumstances of the case are that grant of damages shall not be sufficient compensation, the court may make an order for specific performance where the same has been sought and it is clear that it is equitable and in the interests of justice to grant such relief.
 17. In the instant matter, the Plaintiff maintained that the deceased complied with his part of the bargain and was issued with ownership certificates and beacon certificates. I have considered the ownership certificate produced by the Plaintiff, which certificates were not challenged or denied by the Defendants. The same shows that Plot Nos. 450, 451, 452, 453 and 454 are owned by deceased. In addition, the contribution booklet card shows that the balance for the plots in issue was nil. Therefore, I do not agree with the Defendant's submissions that the Plaintiffs was to pay title deed fees of Kshs. 70,000/- per a plot and transfer fees of Kshs. 60,000/- per plot. There was no evidence produced by the Defendant to back up those allegations as no document showing that that amount was owed.
 18. While the Plaintiff has demonstrated having paid for the plots in issue, he did not produce any document to demonstrate the existence of Mavoko Block 2/49 and in whose name that property is registered. This is in view of the fact that the Plaintiff's testimony that at the time the deceased purchased the suit property, the defendant was in the process of buying the same from the original owner. No search was produced to show whether the suit property was registered in the defendant's name so that if an order of specific performance is issued, then the Defendant can comply. It is not for this court to speculate or presume and the court cannot predicate its orders on assumptions.
 19. In addition, the Defendant testified that the purchased plots are unavailable and that if the balance of Kshs. 650,000/- is paid, he will transfer other 5 plots to the Plaintiff. In the premises and for the above reasons, I find that the deceased complied with his part of the bargain, but in the circumstances of this case, this is not a proper case for grant of the relief of specific performance. Therefore, the court will grant an alternative order of damages.
 20. The deceased purchased and paid for the plots in issue. The Defendant for no reason failed to transfer the Plots to the deceased. Although the Defendant alleged that there was an outstanding balance, no counterclaim was filed and no evidence of the balance was shown to court. Damages can be granted in lieu of an order for specific performance. Having considered that the deceased paid the entire purchase price and the fact that he cannot get orders for specific performance, I order that damages in the sum of Kshs. 1 million be paid to him by the Defendant.
 21. In the end, I enter judgment for the Plaintiff against the Defendant for payment of the sum of Kshs. 1 million being damages. The Defendant shall bear the costs of the suit.
 22. Orders accordingly.



**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 31ST DAY OF MAY,
2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

A. NYUKURI

JUDGE

In the Presence of;

Mr. Mwangi holding brief for Mr. Ngugi for Plaintiff

No appearance for Defendant

Josephine – Court Assistant

