



Laikipia & Nakuru Property Investments Co. Ltd v Halifax Limited & another (Environment & Land Case E005 of 2021) [2023] KEELC 17414 (KLR) (18 May 2023) (Judgment)

Neutral citation: [2023] KEELC 17414 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT & LAND CASE E005 OF 2021**

**YM ANGIMA, J
MAY 18, 2023**

BETWEEN

LAIKIPIA & NAKURU PROPERTY INVESTMENTS CO. LTD APPLICANT

AND

HALIFAX LIMITED 1ST RESPONDENT

NATIONAL BANK OF KENYA 2ND RESPONDENT

JUDGMENT

A. Applicants' Claim

1. By an originating summons dated July 5, 2021 and amended on July 28, 2022 expressed to be based upon Order 37 rule 7 of the [Civil Procedure Rules](#), 2010, the Applicant sought determination of the following questions:
 - a. Whether the duty of the Applicant as the vendor to hand over vacant possession of the property LR No 6329 original No 2421/1 to the 1st Respondent in terms of the sale agreement dated August 11, 2015 and the addendum to the sale agreement dated May 5, 2016 was extinguished by operation of the law in view of change of the proprietorship status from the Applicant herein to the 1st Respondent herein in respect to LR No 6329 original No 2421/1.
 - b. Whether there exists a balance from the agreement dated August 11, 2015 of Kshs 162,000,000/= that is due and payable by the Respondents to the Applicant which court should direct that the same be paid within 7 days after judgment with interest by both the Respondents at courts rate of 14% from the date the same fell due until payment in full.
 - c. Whether in default of payment of the entire consideration as well as interest, the title held by the 1st Respondent being, LR No 6329 (original No 2421/1) should be cancelled.
 - d. Who would pay the costs of this suit?



2. The originating summons was based upon the grounds set out on the face thereof and the contents of the supporting affidavit sworn by Wilson Kiptoo Leitich on July 28, 2022 and the exhibits thereto. It was pleaded that *vide* a sale agreement dated August 11, 2015 the Applicant agreed to sell LR No 6329 (Original No 2421/1) located in Rumuruti to the 1st Respondent at a sum of Kshs 180 million. It was further pleaded that the 1st Respondent paid a deposit of 10% of the purchase price whereas the balance was to be paid by the 2nd Respondent on the basis of a professional undertaking dated February 15, 2016.
3. The Applicant pleaded that it was a term of the 2nd Respondent's undertaking that the balance of Kshs162 million was to be released within 14 days upon registration of the transfer in favour of the 1st Respondent and registration of a charge in favour of the 2nd Respondent. It was thus the Applicant's case that in spite of transfer and registration of the charge, the 2nd Respondent had refused, failed or neglected to pay the balance of the purchase price in the sum of the Kshs 162 million hence the suit.

B. 1st Respondent's Response

4. The 1st Respondent filed a replying affidavit sworn by Jolomat Lenegwesi on November 15, 2021 in opposition to the originating summons. The 1st Respondent admitted the existence of the sale transaction with the Applicant but responded as follows:
 - a. That the balance of the purchase price was to be paid by the 2nd Respondent only upon completion and handing of vacant possession of the suit property in terms of the addendum to the sale agreement.
 - b. That the Applicant had failed to honour its part of the sale agreement by failing to give vacant possession of the suit property.
 - c. That the Applicant had resorted to the use of the criminal justice system by harassing its directors through the Directorate of Criminal Investigations and the County Commissioner on account of the said transaction.
 - d. That the 1st Respondent had previously filed Nyahururu ELC No 26 of 2018 (the previous suit) seeking, inter alia, specific performance of the agreement in relation to vacant possession whereby a consent order was recorded for specific performance and vacant possession which the Applicant had failed to comply with.
 - e. That the 1st Respondent had suffered and continued to suffer loss and damage due to its inability to utilize the suit property productively.
 - f. That in the premises, the suit was a gross abuse of the court process as the matters in dispute had been determined in the previous suit.

C. 2nd Respondent's Response

5. The 2nd Respondent filed a replying affidavit sworn by Wanda M Atsiaya on October 14, 2022 in opposition to the amended originating summons. The 2nd Respondent admitted knowledge of the transaction between the Applicant and the 1st Respondent and having given an undertaking to pay the sum of Kshs 160 million. However, it pleaded that it was not liable to pay the Applicant on account of the undertaking for the reasons:
 - a. That what it gave *vide* its letter dated February 15, 2016 was not professional undertaking but a bank guarantee.



- b. That the Applicant and the 1st Respondent had introduced an addendum to their sale agreement by introducing new terms and conditions to the sale transaction without reference to the 2nd respondent.
- c. That the completion period in the original agreement was 120 days but the parties to the sale agreement had extended it by a further 60 days in the addendum without reference to the 2nd respondent.
- d. That in any event, the balance of the purchase price was to be paid only upon the Applicant giving vacant possession of the suit property and there was no confirmation that the Applicant had given vacant possession.

D. Applicant's Reply

- 6. The Applicant filed a further affidavit in response to the replying affidavits filed by the 1st and 2nd Respondents. It was contended that the effect of transfer of ownership of the suit property was not addressed in the previous suit. It was thus submitted that the instant suit was not res judicata. It was further contended that there was no requirement in the 2nd Respondent's undertaking that payment shall only be made upon vacant possession of the suit property being granted.
- 7. The Applicant was of the view that the bank guarantee stood on the same footing as letter of credit and performance bond and that the 2nd Respondent should honour its obligation regardless of any dispute between parties to the underlying transaction. The Applicant contended that a bank guarantee was an independent contract from the underlying transaction.

E. Directions on Submissions

- 8. When the matter came up for directions it was directed that the originating summons shall be canvassed through written submissions. Consequently, the parties were granted timelines within which to file and exchange their written submissions. The record shows that the Applicant's submissions were filed on January 31, 2023 whereas the 2nd Respondent's submissions were filed on March 21, 2023. However, the 1st Respondent's submissions were not on record by the time of preparation of the judgment.

F. Issues for Determination

- 9. The court has considered the Applicant's amended originating summons, the Respondents' replying affidavits, the Applicant's further affidavit and the material on record. The court is of the opinion that the following issues arise for determination:
 - a. Whether the Applicant's duty to hand over vacant possession of the suit property was extinguished by operation of law.
 - b. Whether the 2nd Respondent is liable to pay the Applicant the balance of the purchase price in the sum of Kshs 162 million.
 - c. Whether the 1st Respondent's title to the suit property should be cancelled on account of default of payment.
 - d. Who shall bear costs of the suit.



G. Analysis and Determination

(a) Whether the Applicant's duty to hand over vacant possession of the suit property was extinguished by operation of law

10. The court has considered the material and submissions on record on this issue. The Applicant submitted that although the suit property was being sold with vacant possession and although the addendum to the sale agreement stipulated that full payment of the purchase price was to be made only upon vacant possession being given, this obligation was somehow extinguished by operation of law. The Applicant, however, did not cite any statutory or precedent authority to support that proposition. The Applicant simply submitted that its obligation to give vacant possession came to an end the moment the suit property was transferred to the 1st Respondent at the Land Registry.
11. The court has noted that under clause 6.1 of the original sale agreement dated August 11, 2015 the suit property was being sold with vacant possession and the 1st Respondent was to take possession upon payment of 10% deposit. The addendum to the sale agreement dated May 5, 2016 made "full and complete" vacant possession a condition for full payment of the purchase price. The court has further noted that the consent order in the previous suit directed the Applicant to specifically remove the remaining occupants from the suit property and hand over vacant possession thereof to the 1st Respondent as per the terms of the sale agreement dated August 11, 2015 and the addendum thereto dated May 5, 2016.
12. There is no indication on record to demonstrate that the said consent order has ever been set aside or varied either by consent of the parties or by a court order. It has been held that a consent order stands on the same footing as a valid contract between parties and it can only be varied or set aside upon grounds which would justify the setting aside of a contract. A consent order cannot simply be wished away or ignored at the instance of one party against the will of the other party to the consent.
13. It is clear from the terms of the sale agreement and the addendum thereto that a large portion of the purchase price was to be financed by the 2nd Respondent. It must have been contemplated by the parties that the suit property shall be transferred to the 1st Respondent and then charged to the 2nd Respondent. Such a financing arrangement was not intended to relieve the Applicant of its legal obligation of handing vacant possession. In the premises, the court is not satisfied that the Applicant's obligation was extinguished by the fact of transfer of the suit property or by operation of law. The Applicant is obviously in breach of the terms of its sale agreement with the 1st Respondent and the court is not prepared to aid and abet it in such breach.

b. Whether the 2nd Respondent is liable to pay the appellant the sum of Kshs 162 million sought in the suit

14. The court has considered the material and submissions on record on this issue. The Applicant submitted that the 2nd Respondent's undertaking in its letter dated February 15, 2016 was in effect a bank guarantee which should be honoured regardless of any dispute which may arise on the sale agreement between the parties to the underlying transaction. It was further submitted that the said guarantee was on the same footing as a performance bond or letter of credit which should be honoured upon demand and without question. It relied upon the cases of *Edward Owen Engineering Ltd vs Barclays Bank International Ltd* [1978]1 ALL ER 976 and *Transafrica Assurance Co Ltd vs Cimbria (EA) Ltd* [2002]2 EA 627(CAU) in support of its submission on bank guarantees.



15. The 2nd Respondent, on the other hand, submitted that it was not liable to pay the sum claimed because of at least two reasons. First, it was submitted that the sale agreement dated August 11, 2015 was varied by the parties to make full and complete vacant possession a pre-condition for full payment of the purchase price unless the 1st Respondent elected to retain Kshs 18 million as security for vacant possession. The 2nd Respondent submitted that it had not received confirmation of either vacant possession or 1st Respondent's election to retain Kshs 18 million as security for vacant possession hence its obligation to release Kshs 160 million had not arisen.
16. The second reason was that it had been discharged from its legal obligation because the parties to the sale agreement had varied the terms of the sale agreement without reference to the 2nd Respondent. It was pointed out that the completion period was varied and new conditions on resettlement of the squatters on the suit property were introduced in the addendum.
17. The court is of the opinion that the sole purpose of the undertaking given by the 2nd Respondent was to facilitate payment of the balance of the purchase price for the suit property to the Applicant as the vendor. The court is further of the view that the said undertaking was similar to the professional undertaking which is normally given by a purchaser's advocate to the vendor's advocate indicate in a typical conveyancing transaction. The purpose of such an undertaking is to secure payment of the balance of the purchase price upon fulfilment of certain conditions contained either in the undertaking or the sale agreement.
18. The court does not agree with the Applicant's submission that the undertaking dated February 15, 2016 was an unconditional bank guarantee payable on demand without cavil or argument in accordance with the law on bank guarantees. The court is also unable to agree with the contention that it was similar to a performance bond payable on demand or a letter of credit employed in international trade as suggested by the Applicant.
19. There is no doubt from the terms of the undertaking dated February 15, 2016 that the 2nd Respondent was bound to release the sum of Kshs 160 million to the Applicant on account of the sale agreement dated August 11, 2015. The 2nd Respondent was required to pay the said sum upon two conditions only, that is, the successful registration of the transfer of the suit property in the 1st Respondent's name and the registration of a charge in the 2nd Respondent's favour. It is the Applicant and the 1st Respondent who introduced a third condition for payment of the balance of the purchase price vide the addendum dated May 5, 2016. By the said addendum the parties to the sale transaction made full payment of the balance conditional upon the Applicant giving "full and complete vacant possession" of the suit property unless the 1st Respondent opted to retain Kshs 18 million as security for obtaining vacant possession. There is no evidence on record to demonstrate such an election by the 1st Respondent.
20. There is no doubt from the material on record that the Applicant has never given full and complete vacant possession of the suit property as contemplated by the parties in the addendum to the sale agreement. The material on record further shows that when the Applicant failed to give vacant possession of the suit property the 1st Respondent filed the previous suit seeking various reliefs against the Applicant including an order of specific performance directing the Applicant to remove the remaining occupants on the suit property and to hand vacant possession thereof to the 1st Respondent. It is also not contended that a consent order was recorded by the parties in which the reliefs sought were granted.
21. The material on record further reveals that not only has the Applicant defaulted in handing vacant possession as per the terms of the sale agreement and the addendum thereto but it has also failed to hand



vacant possession in violation of terms of the consent judgment in the previous suit. The Applicant is now seeking a declaration to the effect that it is legally excused from its obligations under the sale agreement and the consent judgment by operation of law. As indicated before, no statutory provision or other authority was cited by the Applicant in support of the said proposition. The court is of the opinion that having introduced an additional condition for payment of the balance of the purchase price vide the addendum dated May 5, 2016 the Applicant must abide by the said condition which is legally binding upon it. The undertaking to pay cannot be considered in isolation from the said addendum.

22. The court is thus of the opinion that the Applicant is not entitled to payment of the balance of Kshs 160 million on a purposive interpretation of the undertaking dated February 15, 2016 and the addendum dated May 5, 2016 until the condition on vacant possession is satisfied. In the case of *Geonet Communications Ltd vs Safaricom PLC* [2021] eKLR the High Court made the following pronouncement on interpretation of a bank guarantee:

“It is permissible for a court to determine, in context, whether compliance with the intention and purpose of the on-demand guarantee is sufficient. Accordingly, parties should seek to phrase mode of delivery clauses carefully in order to ensure that they are prescriptive in nature and that a failure to comply with the mode of delivery clause would result in an invalid demand. The Supreme Court of Appeal of South Africa in *Schoeman & Others (Schoemans) vs Lombard Insurance Co Ltd* was tasked with considering the correct interpretation in the mode of delivery clause contained in an on-demand guarantee and whether delivery to the guarantor (albeit not in the manner prescribed) is sufficient and constitutes a valid demand. The court held that when interpreting a document, regard must be had to context by reading the provisions in light of the document as a whole and the circumstances which surrounded the document coming into existence. The court further noted that a sensible (business-line) meaning should be preferred to one which is not sensible and which undermines the apparent purpose of the document.”

23. The court is of the view that in a conveyancing transaction if a vendor cannot recover the balance of the purchase price from the purchaser for failure to hand vacant possession according to the terms of the sale agreement then he ought not to recover the same from the purchaser’s financier who had undertaken to make payment on his behalf. In the premises, the Applicant is not entitled to payment of the balance until full vacant possession is given.

c. Whether the 1st Respondent’s title to the suit property should be cancelled on account of default of payment

24. The court has considered the material on record on this issue. The court has already found and held that the Applicant’s obligation to hand vacant possession of the suit property has not been extinguished by operation of law. The court has further found that the Applicant is the one in breach of its obligation to give vacant possession and that it is not entitled to payment of the balance of the purchase price unless and until it is in a position to give vacant possession of the suit property in accordance with the terms of the sale agreement and the addendum thereto. In the premises, the court is not satisfied that the 1st Respondent has defaulted in payment of the purchase price. On the contrary, it is the Applicant who has defaulted on its obligation to give vacant possession as per the terms of the sale agreement and the addendum thereto. Accordingly, there is no legal basis for cancellation of the 1st Respondent’s title.



d. Who shall bear costs of the suit

25. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons vs Twentsche Overseas Trading Co Ltd* [1967] EA 287. The court finds no good reason why the successful parties should be deprived of costs of the action. Accordingly, the 1st and the 2nd Respondents shall be awarded costs of the action to be borne solely by the Applicant.

H. Conclusion and Disposal Orders

26. The upshot of the foregoing is that the court finds no merit in the Applicant’s case. Consequently, the Applicant’s originating summons dated July 5, 2021 and amended on July 28, 2022 is hereby dismissed with costs to the 1st and 2nd Respondents.

It is so decided.

JUDGMENT DATED AND SIGNED AT NYAHURURU THIS 18TH DAY OF MAY, 2023 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

Mr. Koome for the Applicant

N/A for the 1st Respondent

Ms. Maalim holding brief for Mr. Rotich for the 2nd Respondent

C/A - Carol

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Y. M. ANGIMA

JUDGE

