



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO.1945 OF 2001

EVANS NJENGA MURITU.....PLAINTIFF

VERSUS

CONTINENTAL DEVELOPERS LIMITED.....DEFENDANT

JUDGMENT

1. The plaintiff herein filed a suit by way of the plaint dated 12th November, 2001 and sought for judgment against the defendant in the following manner:

a) A declaration that the defendant is contractually bound to the plaintiff.

b) An order of specific performance compelling the defendant to identify, allocate and transfer to the plaintiff a plot of land in Donholm estate of equivalent value or acreage to land No.Nairobi/Block 82/4156.

c) General damages for breach of contract and interest.

d) Any further or other relief that the honourable court may deem just to grant.

2. The plaintiff pleaded in their plaint that sometimes in the year 1988 the Plaintiff and the Defendant entered into an agreement whereby the Defendant agreed to sell to the Plaintiff a plot of land known as Nairobi /Block 82/4156 situated in Donholm Sector A at a consideration of Kenya shillings three hundred and twenty thousand. (Kshs.320,000/=).

3. The plaintiff further pleaded that by several instalments he duly paid the stated sum of Kshs.320,000/= in performance of the said agreement which payments were duly acknowledged by the defendant vide their official receipts.

4. It was also pleaded by the plaintiff that before he could acquire the said property, it transpired that he could not get quiet possession of the same as third party parties unknown to him and the defendant had laid claim to ownership of the land.

5. It was further pleaded that the defendants vide their letter dated 7th February 2000 offered to and the plaintiff accepted such offer for the allocation of an alternative plot of land in Donholm which agreement the defendant has failed to discharge to date.

6. Upon service of summons, the defendant entered appearance and filed his statement of defence on 7th January,2002 and amended on 25th January 2002 to refute the plaintiff's claim

7. The defendant pleaded in their statement of defence that while it is true that the parties entered into an agreement for the sale of the Land known as NAIROBI /BLOCK 82/415 which land belonged to the defendant as the registered proprietor at the time of entering the contract.

8. The defendant further pleaded that the plaintiff delayed the payment of the purchase price for 9 years and when they did complete payment they were unable to transfer the property to themselves as unknown third party had mysteriously acquired ownership of the property.

9. The defendant further pleaded that there has been repeated efforts by the defendant to have the registration in favour of the third party cancelled and the defendant will be seeking leave to enjoin the Commissioner of Lands to the suit to seek orders to compel him to cancel the said registration.

10. At the hearing of the suit the plaintiff testified as the sole witness for the plaintiff's case whereas the defendant closed its case without calling any witness.

11. The plaintiff who was PW1 testified that he knew Continental Developers (the defendant) way back in 1987. He stated that the plot he bought was situated in Donholm area and that the plot number was 4156 which subsequently acquired another number being Nairobi 82 Block 4156.
12. The plaintiff testified that he paid the defendant KShs.320,000/= being the cost price of the plot and produced the various receipts paid on different dates to the defendant for the plot payment.
13. The plaintiff further produced the letter of allocation dated 2nd June 1998 as confirmation of the allocation for the plot 82/4156 at KShs.320,000/=. He also produced a letter dated in August 1999 which is a list to Tena Welfare Association from Continental Developers confirming that the plaintiff had purchased the said plot at Tena Estate.
14. In his testimony the plaintiff produced a document dated 7th February 2000 addressed to the plaintiff from the defendant confirming that the same plot was grabbed before they gave him the title and promised to give an alternative plot in Donholm area.
15. The plaintiff further produced a letter dated 8th September 1995 addressed to the Permanent Secretary, Ministry of Lands & Resettlement in reference to the plot 82/4156, in which they stated that some of the plots have already been sold prior to the allocation and causing problems. Some of the problems as the letter from M.S Njiru & Co. Advocates are that the way leaves reserved for sewage in the referred area has also been sub divided into plots that is L number Nairobi Block 82/4266 rendering the sewer line inaccessible and serviceable.
16. The plaintiff went further and produced a document dated 20th November, 1995 to the Commissioner of lands, Department of lands Nairobi which indicated that the parcels of land affected through allocation are the following Block 82/4153, Block 82/4154, Block 82/4155 and Block 82/4156 which list upto number 72.
17. The plaintiff testified that there is a letter from the defendant stating that they allocated him an alternative plot which they have not honored upto now and therefore the plaintiff prays for the court to ask the defendant to honour their pledge to give him an alternate plot which they have not given him.
18. In cross examination, the witness stated that it is the duty of the defendant to give the plaintiff the alternative plot since they were the ones who said they will do so. He further stated that he did not do the search since he did not think it was necessary and that the defendants were the ones selling the plot.
19. In re-examination, the plaintiff was referred to the bundle of documents specifically the one with the layouts of the plots (subdivision) sold by the defendant and that it showed the plot that the plaintiff had bought.
20. The plaintiff further read to the court the letter dated 2nd June 1998 where the defendant had confirmed allocation of the said plot for KShs.320,000/= and acknowledged receipt of KShs.160,000/= as deposit.
21. At the close of the hearing, this court called the parties to file and exchange written submissions.
22. In his submissions, the plaintiff submitted that it was the plaintiff's uncontroverted evidence that before the defendant could issue the plaintiff with the title document over the said property unknown persons entered into the said property and constructed.
23. It is the plaintiff's submissions that that on account of the foregoing offered to give the Plaintiff an alternative plot and that the he attached self-explanatory letters from the defendants in his bundle of documents which corroborated his evidence.
24. The plaintiff prays that this honourable court on the basis of the agreement entered into by the parties to issue orders compelling the defendant to honour the agreement and allocate the plaintiff an alternative plot of the same acreage as Nairobi /Block 82/4156 and is also seeking damages for breach of contract.
25. On this the plaintiff relied on the case of *Njogu Mangethi v Francis Wakaria Kanogu Nairobi HCCC No. 649 of 2004 P Kihara Kariuki J in issuing an Order of Specific Performance in favour of the Plaintiff against the defendant at Page 2 stated*

“ ...I am satisfied that the plaintiff has established and proved on a balance of probability that there exists between the parties a valid contract of sale and purchase of the suit property.....”
26. The plaintiff contends that the defendant did not call any evidence to rebut the plaintiff's case that the parties entered an agreement in 1988 for the sale of parcel of land No. Nairobi/Block 82/4156 which is a fact that was admitted by the defendant in its amended statement of Defence filed on 25/1/2002. The plaintiff relied on the case of *Achal Sukhbinder Singh & 2 Others v Chandrakent Gor & Another (Nairobi HCCC No. 7 of 2003)* Mary Kasongo J in issuing Specific Performance against the Defendants to transfer the suit property to Defendants held at Page 3 that the Defendants had admitted in their defence the existence of a valid contract.
27. In reply, the defendant gave a brief background of the matter and submitted that it was by the plaintiff's own admission that there was no written contract for the sale of the property known title number Nairobi/Block 82/4156 entered into by the parties herein, duly signed by both parties and duly attested as required by the provisions of Section 3(3) of the Law of Contract Act. The defendant therefore contends that the present suit is incompetent and ought to be dismissed and on this the defendant relied on case of *Mathenge & Another v Kimotho, 1994, KLR PAGE 461*, the Court of Appeal stated that:

“No suit shall be brought upon a contract for the disposition of an interest in land unless the agreement upon which the suit is founded, or some Memorandum or note thereof is in writing and is signed by the parties.”

28. On the issue of specific performance, the defendant submitted that in the present case as the agreement for the intended sale of title Number Nairobi/Block 82/4156 was not reduced to writing and thus unenforceable, it could not find a claim for specific performance. On this the defendant relied on the case *Nabro Properties Limited v Sky Structures Ltd & 2 Others (2002) 2 KLR page 303* Justice Lakha stated:

“It seems clear to me that the earlier agreement is invalid for want of proper execution as it is also incapable of enforcementIn the circumstances, I am satisfied that none of these documents can sustain a claim on behalf of the purchaser performance of the earlier agreement.”

29. On the issue of general damages, the defendant submitted that it cannot be awarded for breach of contract because damages arising from a breach of contract are usually quantifiable and are not usually at large. The defendant relied on the case *Dharamshi v Karsan*.

30. I have considered the evidence tendered alongside the contending submissions and authorities relied upon. The following are the issues arising for determination:

a) Whether there was an agreement between the parties herein

b) Whether the plaintiff is entitled to an order of specific performance of the agreement between him and the defendant.

c) Whether the plaintiff is entitled to the award of damages.

31. On the first issue, I borrow from the Black’s Law Dictionary, 8th Edition –

“The term “contract” has been used indifferently to refer to three different things –

(i) the series of operative acts by the parties resulting in new legal relations;

(ii) the physical document executed by the parties as the lasting evidence of their having performed the necessary operative acts and also an operative fact as itself;

(iii) the legal relations resulting from the operative acts, consisting of a right or rights in personam and their corresponding duties, accompanied by certain powers, privileges, and communities. The sum of these legal relations is often called “obligation” William R. Anson – Principles of the Law of Contract”

32. These attributes may be found in **“oral contract”**, also called **“parole contract”**, or **“simple contract”**, which is a contract or modification which is not in writing, or is only partially in writing. A parole contract is subject to the common law principle that a writing intended by the parties to be a final embodiment of their agreement cannot be modified by evidence of earlier or contemporaneous agreements that might add to, vary, a contract in writing. This rule usually operates to prevent a party from introducing extrinsic evidence of negotiations that occurred before or while the agreement was being reduced.

33. From my evaluation of the evidence, it is clear that the defendant did in their amended defence admit that there was an agreement with the plaintiff where the defendant agreed to sell to the plaintiff Plot of land Known as Nairobi/Block 82/4156 situated in Donholm Sector A.

34. The plaintiff further submitted that he paid the purchase price which they had agreed to be Kshs.320,000/= in installments and completed the same and produced the receipts for prove of payment for the same.

35. The defendant on the other hand in his submissions insists that the suit herein should fail for the fact that there was no written contract for the sale of the said property as per the provisions of Section 3(3) of the Law of contract.

36. I have noted that the defendant on its part did not call any evidence to refute the fact that there was no agreement and therefore cannot be heard to argue its case through their submissions.

37. Further to that a legal contract is an agreement between two parties that creates mutual, legally enforceable obligations. Seven essential elements must be present before a contract is binding: the offer, acceptance, mutual assent (also known as “meeting of the minds”), consideration, capacity, and legality.

38. In this case there were two parties that is the plaintiff and defendant who were had the capacity and that there was an offer made to plaintiff who accepted and the consideration which was the money which had been paid to the defendant being the plot payment of Kshs.320,000/=.

39. The fact also that the defendants are willing to give back to the plaintiff an alternative plot in order to compensate him for the loss of the previous suit property is a clear indication that there was an agreement.

40. That notwithstanding, I am satisfied that there was an agreement between the plaintiff and the defendant.
41. On the second issue, the plaintiff entered into an agreement with the defendant for the purchase of Plot described as Nairobi/block 82/4156 situated in Donholm. That the plaintiff paid the full purchase price of Kshs.320,000/= to the defendant.
42. The plaintiff told the court that he inspected the suit property described with the defendant’s representatives where the beacons were pointed out to him and confirmed that the property was empty and unoccupied.
43. The plaintiff further stated that just before the defendant could issue him the title deed over the said suit property unknown persons entered and constructed.
44. It was the plaintiff’s evidence that the defendant herein on account of the foregoing offered to give the plaintiff an alternative plot which offer the plaintiff accepted.
45. The plaintiff further submitted the some of the plots sold by the defendant including the suit property were way leaves reserved for sewage in the referred area has also been sub divided into plots that is L number Nairobi Block 82/4266 rendering the sewer line inaccessible and serviceable.
46. On the other hand, the plaintiff prays that the defendant to honour their pledge to give him an alternate plot which they have not given him todote.
47. In the case of **Reliable Electrical Engineers Ltd v Mantrac Kenya Limited (2006) eKLR**, where Justice Maraga (as he then was) stated that:-

“Specific performance like any other equitable remedy is discretionary and the Court will only grant it on well laid principles”

“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 enforceable. Even when 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 when damages an adequate remedy specific performance may still be refused on the ground of undue influenced or where it will cause severe hardship to the defendant.”

48. The remedy of specific performance is an equitable remedy which is discretionary and courts must use their discretion judiciously. There would be no hardship caused to the defendant if an order for specific performance is granted as this was the intention of the agreement to sell and transfer Plot Nairobi Block 82/4156 of land to the plaintiff of which the plaintiff paid in full.
49. The court will not allow such injustice to be occasioned to parties who have put their hard earned money to a project.
50. On the third issue, the proper remedy where breach of contract is established is an award of special of damages and that the same ought to be specifically pleaded and specifically proved. I have also considered the case of **Abson Motors Limited vs. Dominic B. Onyango Konditi [2018] eKLR**, and I am fully in agreement with the defendant that where breach of contract is proved, the court ought to award special damages and not general damages. I agree too that such an award of special damages can only be awarded where the same had been specifically pleaded in the pleadings.
51. I have considered the pleadings, the evidence and the submissions of learned counsels. I have come to the conclusion that this is a case where I should exercise my discretion to order for specific performance of the agreement entered into between the plaintiff and the defendant. I hereby order and direct the defendant to honour their pledge to give the plaintiff an alternative plot equivalent in acreage to land no. Nairobi/Block 82/4156. The defendant to pay costs of this suit to the plaintiff.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 19TH DAY OF NOVEMBER, 2021.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant