



Omboya v Zumzum Investments Ltd & 2 others; Omondi (Interested Party) (Environment & Land Case 230 of 2013) [2023] KEELC 19004 (KLR) (25 July 2023) (Judgment)

Neutral citation: [2023] KEELC 19004 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 230 OF 2013
NA MATHEKA, J
JULY 25, 2023**

BETWEEN

TOM OTIENO OMBOYA PLAINTIFF

AND

ZUMZUM INVESTMENTS LTD 1ST DEFENDANT

**HABITAT AND HOUSING IN AFRICA (SHELTER AFRIQUE) 2ND
DEFENDANT**

PURITY ACHIENG OUKO 3RD DEFENDANT

AND

MICHAEL OKATCH OMONDI INTERESTED PARTY

JUDGMENT

1. At all material times to this suit the. 1st Defendant was the registered owner of the Title No CR 3383.1, Subdivision CR 17051/3, Subdivision No 7446(Orig 1482/120) Section MN measuring approximately 0.0306 Ha or thereabout. The 2nd Defendant is the registered chargor of the same. The Plaintiff avers that even though the said land was registered in the name of the 1st Defendant, the 1st Defendant had in fact sold the same to the 3rd Defendant. The Plaintiff avers that the 3rd Defendant is the beneficial and actual owner of the said land as from the 29th day of April 2004 when she purchased the same from the 1st Defendant. On the 29th day of April 2004 the Plaintiff purchased the above said land from the 3rd Defendant at an agreed consideration of Kshs 2,200,000 which amount was fully paid to the 3rd Defendant. Despite having paid the whole purchase price to the 3rd Defendant, the 3rd Defendant has since ignored to have the same transferred to the Plaintiff. The Plaintiff avers that the Defendants have jointly played various malicious roles to frustrate the ownership and occupation of the Plaintiff upon the land thereby putting the interest of the Plaintiff at risk. The 1st Defendant



has also ignored to transfer the said land to him or to the 3rd Defendant. 2nd Defendant has also ignored to have the charge discharged. The 3rd Defendant has even ignored to push and compel the 1st Defendant to have the land transferred to her. The 2nd Defendant has continued having the charge in place notwithstanding that the charge also covers other adjoining lands. As a result of the Defendants' acts the Plaintiff has continued to be deprived the usage of his land and has suffered loss and damage. The Plaintiff prays for judgment to be entered against the Defendants for:

- a. An order directing the 3rd Defendant to execute a discharge of charge of the land known as Title No; CR 33831, Subdivision CR 17051/3, Subdivision No 7446(ORIG 1482/120) Section 11 measuring approximately 0.0306Ha -or thereabouts.
 - b. An order directing the 1st and 3rd Defendants to execute a transfer of the said land (Title No; Cr 33831, Subdivision Cr 17051/3, Subdivision No, 7446(ORIG - 1482/120) Section 11 MN) in of the Plaintiff.
 - c. Damages for their failure to transfer the land to the Plaintiff since April 2004.
 - d. Costs of this suit.
2. The 3rd Defendant in her statement of defence denies ever selling the suit property to the Plaintiff on April 29, 2004 and further denies that she had time received Kshs 2,200,000 or any part thereof from the Plaintiff either directly or otherwise as alleged. The 3rd Defendant avers that the Plaintiff's suit is incompetent, defective and/or bad in law insofar as it is founded on a non-existent and or unexecuted contract for the sale of land and the same ought to be struck out with costs. The 3rd Defendant avers that suit is time barred by virtue of the provisions of Section 4 of the *Limitation of Actions Act*, Cap 22.
 3. The Interested Party avers that there has never been any sale of the suit property between the Plaintiff and the 3rd Defendant. It is the Interested Party's assertion that the suit property was sold to him on 12th May, 2014 and he paid stamp duty for the same awaiting the registration of the transfer in his favour. By virtue of having bought the suit property from the 3rd Defendant and being in occupation and/or possession without his quiet enjoyment of the aforesaid property being interfered with and the confirmation by the 3rd Defendant that she sold the property to the Interested Party and not the Plaintiff it is the Interested Party's claim that he is the bona fide purchaser and owner of the suit property. The Interested Party's counterclaim against the Plaintiff is for a declaration that he is the legal owner of the suit property. An order to remove the caution registered against the property. An order for the Transfer for which stamp duty had already been paid by the Interested Party to be registered in favour of the third party accordingly. I find that though the Interested Party has stake in this case he was not a party ab initio and cannot be awarded substantive orders in this suit but is free to pursue the same with the parties involved.
 4. This court has considered the evidence and the submissions therein. In the present case an agreement of sale between Purity Achieng Ouko as the vendor and Tom Otieno Omboya as the purchaser has been adduced in evidence. This agreement is neither dated nor executed by both parties. It is only the Plaintiff who has signed the agreement, and the said signature has not been attested by a witness. The Plaintiff maintained that there was a contract executed between himself and the 3rd Defendant and is entitled to an order of specific performance on the basis of the said agreement of sale.
 5. The *Law of Contract Act* clearly stipulates the requirements for a valid instrument to convey an interest in land. Section 3 (3) of the *Law of Contract Act* (Cap 23 of the Laws of Kenya) stipulates that;

“No suit shall be brought upon a contract for the disposition of an interest in land unless—



- a. the contract upon which the suit is founded—
 - i. is in writing;
 - ii. is signed by all the parties thereto; and
 - b. the signature of each Party signing has been attested by a witness who is present when the contract was signed by such Party:”
6. The contract was signed by only one Party, the Plaintiff. A fact he admitted during cross-examination and contended that the 3rd Defendant refused to execute the contract. Informed by the legal framework set herein above, the court cannot give effect to an agreement for sale of the suit property on the ground that it was not signed by the 3rd Defendant. The Court of Appeal in *Kukal Properties Development Limited vs Tafazzal H Maloo & 3 others* (1993) eKLR held that;
- “The execution of a legal document is a matter of fact. It is either executed or not executed. This was an agreement for the disposition of interest in land and had to comply with Section 3(3) of the *Law of Contract Act*... The agreement in question was not signed by the appellant or anyone authorized by the appellant to sign it... It is therefore plain beyond argument that there was no concluded agreement both in fact and in law between the appellant and the Porbunderwallas which could be enforced by a decree for specific performance.”
7. This agreement was not duly executed by both parties hence it was neither binding nor enforceable against the 3rd Defendant. An unexecuted agreement by parties cannot be deemed to be executed by reference to correspondences prior of after the date of the intended agreement. Therefore, the letter dated September 16, 2004 from Sachdeva & Company advocates to the Plaintiff cannot be said to make the unexecuted contract enforceable. There is no evidence adduced that the Plaintiff paid and the 3rd Defendant received either the deposit or the balance towards the purchase of the suit premises. In *Leo Investment Ltd vs Estuarine Estate Ltd* (2017) eKLR it was held that;
- “It is trite law that a contract consists of three fundamental elements; offer acceptance and consideration. In the suit under consideration, a statutory interest would have crystallized if the formal statutory requirements had been satisfied and the essential elements of a contract existed. In the present suit, apart from lack of execution by the vendor, the cheque forwarding 10% deposit was returned unencashed. In essence, consideration did not pass. To this extent, the Plaintiff did not acquire a crystallized legal interest in the suit property. There is no evidence of any of the key features of an equitable relationship or crystallized equitable interest in the suit property in favour of the Plaintiff. Besides non-compliance with the statutory formal requirements of Section 3(3) of the *Law of Contract Act*, the contract lacked completeness in terms of essential elements. Possession was not given to the Plaintiff and purchase price was not accepted by the vendor. To this extent, the Plaintiff acquired neither a legal nor an equitable interest in the suit property.”
8. I find that the unsigned sale agreement did not comply with the requisite conditions set out in Section 3(3) of the *Law of Contract Act* to warrant it to be deemed a valid transaction that would confer legal or equitable interest onto the Plaintiff that can be enforced vide an order of specific performance. Therefore, I find that the Plaintiff has failed to prove his case of a balance of probabilities and his suit is dismissed with costs.

It is so ordered.



DELIVERED, DATED AND SIGNED AT MOMBASA THIS 25TH JULY 2023.

N.A. MATHEKA

JUDGE

