



Ndichu & another v Ndungu & another (Environment & Land Case 712 of 2017) [2023] KEELC 19021 (KLR) (18 July 2023) (Judgment)

Neutral citation: [2023] KEELC 19021 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 712 OF 2017**

**BM EBOSO, J
JULY 18, 2023**

BETWEEN

HARUN KAGO NDICHU 1ST PLAINTIFF

JACKSON KAMAU THUO 2ND PLAINTIFF

AND

PETER NDEGWA NDUNGU 1ST DEFENDANT

LUCY NYOKABI NDEGWA 2ND DEFENDANT

JUDGMENT

Background

1. Through a plaint dated 21/7/2017, the plaintiffs sought the following verbatim reliefs against the defendants.
 - i. An order the defendant to specifically transfer one (1) acre from parcel L.R No Githunguri/ Kanjai/2257 to the plaintiffs (sic).
 - ii. A permanent injunction restraining the defendants from trespassing into, subdividing, transferring, wasting, alienating or otherwise dealing with one (1) acre in possession of the plaintiffs in L.R. No. Githunguri/ Kanjai/2257;
 - iii. Cost of this suit.
2. Despite service of summonses through a notice published in the Standard Newspaper on 25/5/2022 at page 25, the defendants neither entered appearance nor participated in the proceedings, hence the suit was undefended.



Plaintiff's Case

3. The case of the plaintiffs is contained in the plaint dated 21/7/2017; their respective witness statements filed on 22/8/2017; the oral evidence tendered at the hearing on 6/6/2023; the eight exhibits produced at the hearing, among them, a sale agreement dated 2/5/2014 relating to sale of one acre out of land parcel number Githunguri/ Kanjai/2257 [the suit property]; and the written submissions dated 21/3/2022, filed by M/s Makori & Karimi Advocates.
4. In summary, the plaintiffs' case is that, on 2/5/2014, they entered into a written sale agreement with the defendants, pursuant to which the defendants agreed to sell to them one acre out of land parcel number Githunguri/Kanjai/2257 at a consideration of Ksh. 1,500,000/=. The plaintiffs contend that they paid a total sum of Kshs. 1,065,000/= and the balance of Kshs. 435,000/= was to be paid upon successful transfer of the one acre of the suit property into their names.
5. It is the plaintiffs' case that with the consent of the defendants, they immediately took possession of the one acre and have continued to be in possession to date. They have since constructed a fence around the one acre. They have also built a dwelling home on the land. They have laid irrigation pipes on the parcel as part of a farming project they intend to start on the land.
6. The plaintiffs add that they reported the defendants to the Local Administration upon learning that the defendants intended to sell the suit property to other purchasers. The Local Administrators summoned the defendants and directed them to desist from breaching the agreement.
7. The plaintiffs contend that the defendants have refused and/or neglected to complete the conveyance. They assert that they have substantially performed their obligations under the sale agreement and are ready and willing to pay the balance of the purchase price. Their case is that the defendants have breached the terms of the agreement and have, without any just reason, refused to complete the contract.

Plaintiffs Evidence

8. The 1st plaintiff testified as PW1. He adopted his undated witness statement filed on 22/8/2017 as part of his evidence-in-chief. He also produced the eight documents contained in the bundle of documents dated 21/7/2017. PW1 testified that the defendants were supposed to excise and transfer to them one acre out of land parcel number Githunguri/ Kanja/ 2257. He further stated that they took possession of the parcel of land upon payment of the deposit of Ksh. 1,065,000 and constructed a three bedroomed permanent home on the land.
9. PW1 confirmed that the restriction they placed on the title of the suit property still subsists. He asked the court to grant the prayers sought in the plaint.
10. The 2nd plaintiff testified as PW2. He adopted his witness statement filed on 22/8/2017 as part of his evidence-in-chief. PW2 reiterated the facts stated by PW1.

Submissions

11. The plaintiffs' claim was canvassed through written submissions dated 21/6/2023, filed by M/s Makori & Karimi Advocates. Counsel identified the following as the key issues that fell for determination in this suit: (i) Whether the plaintiffs have discharged their legal burden of proof; (ii) What reliefs are available to the plaintiffs; and (iii) Who should bear costs of the suit.
12. On whether the plaintiffs had discharged their legal burden of proof, counsel submitted that the plaintiffs produced a contract for the purchase of the suit property, together with receipts relating to



- the monies they paid to the defendants, demonstrating that they had complied with the terms of the sale agreement. Counsel further submitted that the plaintiffs produced a letter in which they indicated their willingness to complete the contract by paying the balance of the purchase price upon execution of the transfer forms by the defendants, as was agreed by the parties in the sale agreement.
13. Counsel contended that the defendants directed the plaintiffs to take possession of the suit property as they arranged to get the requisite completion documents, which the plaintiffs did and even went ahead to develop the suit property. Counsel argued that it was the defendants who had failed to discharge their obligation under the contract without any lawful or justifiable cause. Counsel relied on the decision in the case of *Patrick Kalava Kulamba & 2 Others v PK & Another* [2019] eKLR.
 14. Counsel further submitted that the evidence tendered by the plaintiffs made it abundantly clear that they entered into a sale agreement with the defendants; they performed their part of the contract and; they were only awaiting completion of the contract by the defendants. Counsel argued that the plaintiffs deserved an order of specific performance because they had undertaken substantial developments on the suit property. Counsel contended that in the circumstances, the remedy of rescission would be unjust and untenable.
 15. Counsel further submitted that it was an established principle of law and practice that where a contract has been performed substantially, the only remedy available to parties is specific performance. Counsel relied on the decision in *Samuel Murigi Waigwa v Francis Babu Mwangi* [2021] eKLR where the Court cited the decision of the Court of Appeal in *Mwangi v Kiiru* [1987] eKLR where it was held that:

“The prevailing jurisprudence is that where the aggrieved vendor has fully performed his primary obligations and has conveyed the land to the purchaser and handed over possession of the land, the remedy of rescission is not available. The available remedy is to sue for balance of purchase price.”
 16. Counsel submitted that since the defendants had already given possession of the suit property to the plaintiffs, and the latter had performed a substantial part of the contract, the remedy of rescission was not appropriate and the plaintiffs were entitled to the remedy of specific performance.
 17. Counsel prayed that the court compels the defendants to execute the transfer instruments and in default, an order be issued empowering the Registrar of the Court to sign the said forms on behalf of the defendants.
 18. On the issue of costs of the suit, counsel relied on the principle that costs follow the event and cited the case of *Republic v Rosemary Wairimu Munene, Ex-parte Applicant v Ibururu Dairy Farmers Co-operative Society Ltd*, to support this assertion.

Analysis and Determination

19. The defendants did not enter appearance in this suit. They did not file a defence to the plaintiffs' claim. Consequently, the claim is uncontested. I have considered the plaintiffs' pleadings, evidence and submissions. I have also considered the relevant legal frameworks and jurisprudence on the key questions that fall for determination in the suit. The two questions to be answered in this Judgment are: (i) Whether the plaintiffs have proved their case to the required standard; and (ii) Whether the reliefs sought by the plaintiffs are available in the circumstances of this case. I will be brief in my analysis and disposal of the two issues. The analysis and disposal will be in the above sequence.



20. Notwithstanding the fact that the defendants did not contest the plaintiffs' claim, the plaintiffs had the statutory burden to discharge the burden of proof as dictated by Section 107 of the Evidence Act. Section 107 of the Evidence Act provides thus;
- “(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
21. Suffice it to state that, in a civil claim, the standard of proof is proof on the balance of probabilities.
22. The plaintiffs' case is that they entered into a land purchase contract with the defendants, dated 2/5/2014, pursuant to which they purchased one acre from the defendants. The one acre was to be excised out of land parcel number Githunguri/Kanjai/2257. The agreed purchase price of the one acre was Kshs 1,500,000. The plaintiffs contend that they paid to the defendants a total sum of Kshs 1,065,000 in furtherance of the contract, leaving a balance of Ksh 435,000 which was to be paid to the defendants upon execution of conveyance documents by the defendants.
23. The plaintiffs add that subsequent to that, they learnt that the defendants were planning to sell the same land to other purchasers. They came to this court seeking orders of specific performance.
24. At the hearing, the plaintiffs produced a sale agreement dated 2/5/2014, expressed as having been entered into by the plaintiffs as purchasers and the defendants as vendors of one acre that was to be excised out of land parcel number Githunguri/ Kanjai/2257. They also produced a title deed dated 1/2/2010, indicating that land parcel number Githunguri/ Kanjau/2257 was registered in the names of Peter Ndegwa Ndungu (ID No.1087***) and **Lucy Nyokabi Ndegwa (ID No.1057**)**. The title deed indicates that the land measures 0.775 hectares. Further, the plaintiffs produced an official search dated 16/1/2015, showing that the land was registered in the names of the defendants. Also produced as exhibits were three acknowledgements of receipt of purchase price by the defendants, acknowledging receipt of: (i) Kshs 600,000 paid to the defendants on or about 22/5/2014; (ii) Kshs 205,000 paid to the defendants on or about 30/10/2014; and (iii) Kshs 60,000 paid to the defendants on or about 6/11/2014. Through clause (a) of the sale agreement dated 2/5/2014, the defendants acknowledged receipt of Kshs 200,000. The four acknowledged payments make a total of Kshs 1,065,000. Indeed, in the acknowledgement dated 6/11/2014, the defendants acknowledged that the balance of the purchase price was Kshs 435,000 and the said balance was to be paid upon execution of transfer forms.
25. The plaintiffs testified that upon payment of the above purchase price, they took possession of the land, fenced it and developed a permanent dwelling house on the land. They stated that they have been in possession of the land since then. They further stated that the defendants failed to undertake the excision and conveyance of the one acre that they had sold to them. They stated that they had all along been ready and willing to pay the balance of the purchase price.
26. The totality of the above evidence clearly indicates that there was a land sale contract between the parties to this suit; the plaintiffs performed their obligations and they are ready and willing to pay the balance of the purchase price in the sum of Kshs 435,000. It is also clear from the evidence tendered (including the letters from the Deputy County Commissioner for Githunguri Sub-County dated, 24/12/2014) that the defendants received purchase price but became reluctant to excise and convey the one acre which they had sold to the plaintiffs. Consequently, this court is satisfied that the plaintiffs have discharged their burden of proof to the required standard.



27. Are the reliefs sought by the plaintiffs available in the circumstances of this case? The first prayer is a plea for an order of specific performance. The second prayer is a plea for a permanent injunction. The third prayer is a plea for costs of the suit.
28. The relief of specific performance is an equitable common law remedy that is awarded upon well-established principles. Maraga J (as he then was) outlined the principles in *Reliable Electrical Engineering Ltd v Mantrac Kenya Limited* [2006] eKLR in the following words:
- “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 and enforceable. Even when a contract is valid and enforceable, specific performance will however not be ordered where there is an adequate alternative remedy.”
29. In the present suit, the plaintiffs have proved the existence of a valid and enforceable sale of land contract. There is also evidence that indeed the defendants are the registered proprietors of the suit property. There is further evidence that in furtherance of the contract, the plaintiffs paid to the defendants a substantial amount of money and were allowed to take possession of the suit property. There is evidence that the plaintiffs have developed the suit property. The plaintiffs have also given evidence that they are ready and willing to pay the balance of the purchase price.
30. Given the above circumstances, the court is satisfied that the plaintiffs have met the criteria upon which the equitable remedy of specific performance is granted. Based on the evidence before the court, the court is similarly satisfied that the plea for a permanent injunction is merited. On costs, there is no evidence which would warrant a departure from the general principle in Section 27 of the *Civil Procedure Act*, that costs follow the event.
31. In the end, the plaintiffs’ claim is allowed in the following terms;
- a. An order is hereby issued directing the defendants to excise and transfer to the plaintiffs one acre out of land parcel number Githunguri/Kanjai/2257 within 60 days. In default of compliance by the defendants, the Deputy Registrar of this court shall sign all the requisite documents and the Land Registrar shall effect the registration of the one acre in the names of the plaintiffs without requiring them to produce the original title relating to Githunguri/ Kanjai/2257.
 - b. A permanent injunction is hereby issued restraining the defendants against trespassing into, subdividing, transferring, wasting, or alienating the one acre sold to plaintiff.
 - c. The plaintiffs shall deposit in court the sum of Kshs 435,000 within 45 days. In default, the Judgment entered in this suit in favour of the plaintiffs shall stand vacated and replaced with an order dismissing the plaintiffs’ suit.
 - d. Upon the plaintiffs depositing the money in court and upon the defendants conveying the one acre to the plaintiffs, the Court Registry shall release to the defendants the sum of Kshs 435,000.
 - e. The defendants shall bear costs of this suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 18TH DAY OF JULY 2023



B M EBOSO

JUDGE

In the presence of:-

Ms Ochieng for the plaintiffs

Court Assistant: Hinga

