



**Noor v Ngusare & another (Environment & Land Case E240 of 2021)  
[2023] KEELC 20190 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20190 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E240 OF 2021  
AA OMOLLO, J  
SEPTEMBER 28, 2023**

**BETWEEN**

**AMIN SHEIKH NOOR ..... PLAINTIFF**

**AND**

**IRENE JARENGA NGUSARE ..... 1<sup>ST</sup> DEFENDANT**

**REGISTRAR OF TITLES ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff filed this suit against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants vide plaint dated 5<sup>th</sup> July 2021 seeking to be granted the following reliefs:
  - a. A permanent injunction be and is hereby issued against the 1<sup>st</sup> Defendant jointly and severally, her employees, servants or agents, to restrain them from alienating, selling, advertising for sale, transferring or dealing in any way whatsoever all that property known as Apartment Number B6, Block B Almond Villas situate on LR. Number 2019/4350/2.
  - b. An order of specific performance compelling the 1<sup>st</sup> Defendant to complete the sale and transfer of all property known as Apartment Number B6, Block B Almond Villas situate on LR. Number 2019/4350/2.
  - c. An order directing the Deputy Registrar of the High Court of Kenya to execute the requisite transfer documentation relating to all that property known as Apartment Number B6, Block B Almond Villas situate on LR. Number 2019/4350/2 in favour of the Plaintiff.
  - d. An order compelling and directing the 2<sup>nd</sup> Defendant herein to execute all the necessary transfer documents in favour of the Plaintiff and issue to the Plaintiff the title documents relating to Apartment Number B6, Block B Almond Villas situate on LR. Number 2019/4350/2 upon the payment of the requisite taxes and fees.



- e. General and punitive damages for breach of contract.
  - f. Interest on (e) above
  - g. Costs of this suit and interest thereon.
2. The Plaintiff stated that the 1<sup>st</sup> Defendant is the registered proprietor under leasehold of Apartment Number B6, Block B, Almond Villas erected on LR. Number 2019/4350/2 situate along Rose Avenue in Kilimani area of Nairobi herein after referred to as “the suit property” and by a sale agreement dated 3<sup>rd</sup> November 2016 she agreed to sell the same to the Plaintiff at a price of Kshs. 19,250,000.
  3. The Plaintiff averred that the payment schedule of the purchase price for the suit property was a deposit of Ksh. 8,270,000 during execution of the agreement which was paid and the 1<sup>st</sup> Defendant acknowledged receipt and the balance of the purchase price of Ksh.10,980,000 was to be paid on or before 31<sup>st</sup> December 2016.
  4. Further, it is pleaded that the Plaintiff and the 1<sup>st</sup> Defendant agreed that the said balance would be remitted to the 1<sup>st</sup> Defendant’s bank account held at Bank of America Texas USA of which the Plaintiff paid in installments as agreed and all payments accepted by the 1<sup>st</sup> Defendant. However, when the Plaintiff sought for completion documents, she altered the terms of the agreement and sought to demand sums that had not been factored into the agreement in attempts to frustrate the completion process.
  5. The Plaintiff stated that his advocates wrote to the 1<sup>st</sup> Defendant on numerous occasions vide her known last email address being [particulars withheld] seeking to have the transaction completed but received no reply and also via international Courier services served the 1<sup>st</sup> Defendant with a completion notice and demand for completion dated 31<sup>st</sup> January 2020 and 10<sup>th</sup> March 2020 which have been ignored by the 1<sup>st</sup> Defendant.
  6. The Plaintiff further stated that the 1<sup>st</sup> Defendant has cut off all forms of communication with the Plaintiff and has changed legal representation on numerous occasions to the point that no known and identifiable law firm is known to represent her and her acts demonstrate a clear cut case of breach and frustration on the Plaintiff’s right to property. He stated that despite demand and notice to sue having been issued to the 1<sup>st</sup> Defendant the same has been ignored. That although the sale agreement provided for an arbitration clause, the fraudulent acts of the 1<sup>st</sup> Defendant necessities the institution of this suit.
  7. The matter was heard on 27<sup>th</sup> June 2023 with the Plaintiff testifying in support of his case and relying on the documents contained in the list dated 5<sup>th</sup> July 2021. He stated that the 1<sup>st</sup> Defendant was his landlord as at 2013 although he had never met her. PW said he was in contact with her (1<sup>st</sup> Defendant) representative and after staying in the house for 2 years she intimated that she had put the house for sale as she was relocating to USA.
  8. PW averred that they executed a sale agreement for the purchase of the house on 3<sup>rd</sup> November 2016 which agreement set out the terms of the sale. It is his contention that he completed his part of the agreement by paying the purchase price in full. That it was agreed that completion documents were to be handed after payment was done in full but after the full payment, he approached the firm of Lumumba & Lumumba to release the said documents and they declined stating that they had not received instructions from the 1<sup>st</sup> Defendant to do so.
  9. The 1<sup>st</sup> Defendant did not enter appearance in this matter despite being served with the summons, pleadings and hearing notice as stated in the affidavits of service filed and sworn by Nduru Gichamba on 26<sup>th</sup> July 2021, 11<sup>th</sup> August 2021, 11<sup>th</sup> June 2022 and 13<sup>th</sup> June 2023.



## Analysis

10. The Plaintiff and the 1<sup>st</sup> Defendant entered into a sale agreement for the purchase of the suit property for consideration of Kshs 19250000 and which amount according to the Plaintiff was paid in full as per the agreed scheduled payments. It is pleaded that the agreement provided at clause 4 that the completion date was 31<sup>st</sup> December 2016 with a rider to extension of 30 days' subject to mutual consent of the parties. The agreement also provided at clause B(iii) the completion documents that would be handed to the Plaintiff upon the full payment. In addition, the agreement provided the account details where the balance of the purchase price was to be deposited.
11. The Plaintiff stated that he instituted this suit because the 1<sup>st</sup> Defendant is yet to perform her all obligations despite receiving the full payment. The Plaintiff has sought for orders of a permanent injunction and for specific performance against the 1<sup>st</sup> Defendant to effect completion of the sale and transfer of the suit property. The 2<sup>nd</sup> Defendant's role in this suit is to implement the decree in the event the Plaintiff succeeds.
12. I have considered the pleadings and evidence submitted by the Plaintiff in support of his claim and the main issue for determination is whether the he has proved his case on a balance to merit the prayers sought. Section 107(1) of the Evidence Act (Chapter 80 of the Laws of Kenya), provides:

“ 107.

- (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.”

13. There is evidential burden cast upon the Plaintiff to prove the particular facts which he desires the court to believe in its existence. Section 109 and 112 of the Evidence Act provides as follows;

“ 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

14. The Plaintiff's claim is grounded on the sale agreement between him and the 1<sup>st</sup> Defendant for the purchase of the suit property. He has produced the sale agreement dated 3<sup>rd</sup> November 2016. In asserting that he had fully paid the purchase price and receipt of the monies had been acknowledged, the Plaintiff relied on the correspondences exchanged via email. From the record, the print outs of the email produced by the Plaintiff from the 1<sup>st</sup> Defendant are all dated prior to the execution of the agreement. For instance, the email dated 28<sup>th</sup> October 2015 stated thus;

“From: Irene Jarenga Date: Wed, Oct 28, 2015 at 9:33 PM Subject: SELL OF ALMOND COURT B6 To: jmogetoo@gmail.com

Dear Mr Ogeto,

This follows our recent email communication regarding my need to sell my 3bedroom apartment at Almond court villas. I would like to request for your services to help in the transfer of the very property to a Mr. Amin Sheikh Noor. The selling price for the property



has been finalized to 19,250000M (Nineteen million two hundred and fifty thousand) Kenya shillings.

Mr. Noor currently resides in the apartment and can be contacted on [ particulars withheld]  
Please do let me know if you require any more information from me.”

15. The above email shows the intention of the 1<sup>st</sup> Defendant to sell the suit property to the Plaintiff and not an acknowledgement of receipt of any money, noting that the sale agreement was yet to be executed. The correspondence of 30<sup>th</sup> October 2015 enclosed a draft sale agreement to the parties for their perusal and amendment. The sale agreement only confirms receipt of the deposit of Kshs 8270000 by the 1<sup>st</sup> Defendant. There is no evidence produced/provided to this court showing when and how the balance of the purchase price of Kshs 10980000 was paid and or evidence by the 1<sup>st</sup> Defendant confirming receipt of the balance.
16. The fact that the 1<sup>st</sup> Defendant did not enter appearance does not exempt the Plaintiff from demonstrating to this court that he had indeed made the full payment of Ksh. 19,250,000 being purchase price for the suit property. Having failed to produce such evidence of payment, this court finds it difficult to grant the orders both of specific performance and permanent injunction or any other reliefs prayed for in the plaint.
17. In conclusion, I make a finding that the Plaintiff did not produce sufficient evidence to discharge his burden of proof and the result is, this suit is dismissed with no order as to costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> SEPTEMBER 2023**

**A. OMOLLO**

**JUDGE**

