



**Makenzi & another v Yeshe (Environment & Land Case 109 of 2022)  
[2023] KEELC 20154 (KLR) (26 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20154 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE 109 OF 2022  
JG KEMEI, J  
SEPTEMBER 26, 2023**

**BETWEEN**

**PAUL MAKENZI ..... 1<sup>ST</sup> PLAINTIFF**

**MARGARET OKWISA MAKENZI ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**HAILE IKUBU YESHE ..... DEFENDANT**

**JUDGMENT**

1. The Plaintiffs being husband and wife have sued the Defendant for orders of specific performance inter alia. They aver that the Defendant is the registered owner of the suit land being L R No 1480/411 (suit land). That vide an agreement dated the 31/12/97 they purchased the suit land at the sum of Kshs 220,000/- which sum was paid in full. The Plaintiffs were put in possession on the 15/4/99. The Plaintiffs have sought the following orders;
  - a. An order of specific performance of the agreement made between the parties on the 26/12/97
  - b. An order that the Defendant forward to the Plaintiffs or their Advocates all the necessary completion documents in respect of the suit land namely; the original title, duly executed transfer in favour of the Plaintiffs, duly completed and signed valuation form, a certified copy of the Defendant's PIN certificate and any other document required to effect transfer of the suit land
  - c. In default to prayer a and b above the Court do order that the production of the original title over the suit land be dispensed with and that the DR of the Court do sign the transfer over the suit land and any other documents required to effect the transfer in favour of the Plaintiffs.



- d. Upon failure of the Defendant to comply with the order of specific performance and delivery of the completion documents the Deputy Registrar of this Court do execute the relevant transfer documents to facilitate the transfer and registration of the suit land to the Plaintiffs.
- e. Any other or alternative relief which the Court deems fit to grant
- f. Costs of the suit

### **The evidence**

2. The Plaintiffs' case was led by PW1 – Professor Paul Makenzi who testified on his own behalf and that of the 2<sup>nd</sup> Plaintiff. He relied fully on his witness statement on record dated the 9/9/2022 and produced documents in support of his case marked as PEX 1-4.
3. He stated that despite numerous demands to the Defendant and contrary to the term of agreement between the parties, the Defendant failed to surrender the original title and completion documents to enable the registration of the transfer in their names. That they were put in possession on the 15/4/1999 by the Defendant and they have so remained in possession to date. That the Defendant did give him a copy of title, sale price receipt and an undated transfer with respect to the suit land. That thereafter he travelled overseas for work between the years 1999 – 2018 and that his efforts to locate the Defendant have been futile.

### **Service of summons**

4. It is on record that the Defendant was served via substituted services through the Daily Nation newspaper of 16/3/2023 and the Standard Newspaper of 16/3/2023 as well as through registered postal address vide P.O Box 65059 and 45827 Nairobi. See the Affidavit of Service filed on the 8/5/2023 and sworn on the 17/4/23 on record.
5. Despite service of Summons aforesaid the Defendant failed to enter appearance nor file a defence. The suit therefore proceeded by way of formal proof.

### **The written submissions**

6. The Court has read and considered the written submissions filed by the Plaintiffs through their counsel on record which submissions. duly considered, appreciated and taken into account.

### **The determination**

7. Having considered the pleadings the evidence adduced at the hearing the written submissions and all other material placed before the Court, the key issue for determination is whether the Plaintiffs have proven their case.
8. It is not in dispute that the Defendant was duly served but failed to respond. The suit having proceeded undefended does not absorb the claimants from proving their claim to the standard of balance of probabilities obtaining in civil cases.
9. Section 107 of the [Civil Procedure Act](#) speaks to the burden of proof as follows;-

“(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.”

10. In the instant case the Plaintiffs have adverted a claim over the suit land hence the burden of proof rests on their shoulders notwithstanding that the Defendant failed to rebut the suit despite service.
11. It is the Plaintiffs case that they entered into an agreement of sale in 1997 with the Defendant for the sale and purchase of the suit land. The full purchase price was duly paid and a receipt thereof was issued to the Plaintiffs.
12. Is there a valid contract between the parties? Validity of contract is provided for in law. Section 3(3) of the Law of Contract Act read together with Section 38 of the Land Act, 2012 provide that no suit shall be brought upon a contract for the disposition of an interest in land unless; the contract upon which the suit is founded is in writing, signed by all the parties, and the signature of each party signing has been attested by a witness who is present when the contract was signed.
13. Further based on the evidence on record, the Court is being called upon to determine whether the intentions of the parties were to create a binding contract between themselves. The essential components of a contract as was observed by Harris JA in Garvey v Richards {2011} JMCA 16 ought to ordinarily reflect the following principles:

“It is a well-settled rule that an agreement is not binding as a contract unless it shows an intention by the parties to create a legal relationship. Generally, three basic rules underpin the formation of a contract, namely, an agreement, an intention to enter into contractual relationships and consideration. For a contract to be valid and enforceable an essential terms governing the relationship of the parties must be incorporated therein. The subject matter must be certain. There must be positive evidence that a contractual obligation, born out of an oral or written agreement is in existence.”

14. Further in the case of *RTS Flexible Systems Ltd v Moikerei Alois Muller GMBH & Co K. G.* {2010} UKSC 14 the Court pronounced itself as follows:

“The general principles are not in doubt, whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon them, by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalized, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precaution to a concluded and legally binding agreement.”

15. In the case of *Nelson Kivuvani v Yuda Komora & Another*, Nairobi HCCC No956 of 1991, where the Court held that:-

“The agreement for sale of land which contains the names of the parties, the number of the property, the purchase price and the conditions attached thereto, the obligations, express or implied, of each of the parties and signed and witnessed by two witnesses who signed against their names amount to a valid contract.”



16. Applying the above principles of law and the pronouncement of the Court, the Court finds that the agreement on record is duly executed by all the parties to the suit and their signatures witnessed by an Advocate. The Court holds that in the absence of any evidence to the contrary the agreement is valid.
17. The Court has noted the receipt of the purchase price and countersigned by the Defendant and issued on the 15/4/1997 was produced in evidence by PW1. Further PW1 testified that the Defendant handed over a copy of transfer and title to him. The agreement of sale contained completion date of 45 days from the date of the agreement and in specific on or before the 2/6/1997 within which the Defendant was to hand over the completion documents to effect the registration of the title in the name of the Plaintiffs. The Court notes that the copy of transfer is dated the 25/4/1999; it is executed by the parties and their signatures witnessed by Messrs A N Katama, the same Advocate who witnessed the agreement of sale.
18. The actions of the parties taken together with the documents referred to in para 17 clearly depicts a clear unambiguous and forthright intention to create a contract between themselves. The Court has no doubt to hold otherwise.
19. Whether the orders of Specific performance is merited. Granting of specific Performance is discretionary and the Court should in deciding whether or not to grant the orders look at the merits of the case based on a case to case basis and whether there is an adequate alternative. In the case of *Reliable Electrical Engineers Ltd v Mantrac Kenya Limited* (2006) eKLR, the Court 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 are adequate remedy specific performance may still be refused on the ground of undue influenced or where it will cause severe hardship to the Defendant.”
20. In the case of *Sisto Wambugu v Kamau Njuguna* (1983) eKLR, where the Honourable Court observed as hereunder;

“In my judgment the Respondent cannot come to the Court and obtain an order of the transfer of the land, as he sought in his counterclaim, which is in effect an order of specific performance of the agreement, unless he had performed his part of the bargain or can show that he was at all times ready and willing to do so.”
21. In the case the Court finds that there is a valid agreement between the parties, the contract does not suffer from any defects; the Plaintiffs have been in occupation of the suit land since 1999 to date hence has acquired possessory interest in the property and further that the Plaintiffs have paid the full purchase price and performed their part of the contract.



22. Given the findings of the Court in para 21 the Court is guided by the decision in the case of *Thomas Openda v Peter Martin Ahn* [1984] eKLR, where the Court observed as hereunder;

“Accordingly, in my judgment, the purchaser was entitled to treat the contract as still in existence and to sue for the remedy of specific performance. As Lord Diplock said in the recent case of *Sudbrook v Eggleton*, *The Times* July 15, 1982, the normal remedy in such a case is an action for specific performance, because damages are frequently an inadequate and unjust remedy for a refusal to convey the property concerned.”

23. In the circumstances of this case, an order for specific performance is an appropriate remedy and same is hereby granted.

### **Costs of the suit**

24. Section 27 of the *Civil Procedure Act* provides as follows;

“Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the Court or judge, and the Court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the Court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the Court or judge shall for good reason otherwise order.”

25. The suit having been undefended I make no orders as to costs.

26. Final orders for disposal;

- a. An order of specific performance of the agreement made between the parties on the 26/12/97 be and is hereby granted.
- b. The Defendant be and is hereby ordered to forward to the Plaintiffs or their Advocates all the necessary completion documents in respect of the suit land namely; the original title, duly executed transfer in favour of the Plaintiffs, duly completed and signed valuation form, a certified copy of the Defendant’s PIN certificate and any other document required to effect transfer of the suit land within 30 days from the date of this judgement.
- c. In default to prayer (b) above the Court do order that the production of the original title over the suit land be dispensed with and that the Hon Deputy Registrar of this Honourable Court be and is hereby mandated to so sign the transfer over the suit land and any other documents required to effect the transfer in favour of the Plaintiffs.
- d. Upon failure of the Defendant to comply with the order of specific performance and delivery of the completion documents the Deputy Registrar of this Court do execute the relevant transfer documents to facilitate the transfer and registration of the suit land to the Plaintiffs.
- e. I make no orders as to costs.

27. Orders accordingly.



DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 26<sup>TH</sup> DAY OF SEPTEMBER, 2023 VIA MICROSOFT TEAMS.

J G KEMEI

**JUDGE**

**Delivered online in the presence of:**

Plaintiff 1 – Present in person online

Plaintiff 2 – Absent

Defendant 1 - Absent

Court Assistants – Phyllis/Lilian

ELC E109.2022-THIKA **3J**of **3**

