



Centre Park Plaza Ltd v Rural Housing Estates Ltd (Environment & Land Case E013 of 2022) [2023] KEELC 19864 (KLR) (21 September 2023) (Judgment)

Neutral citation: [2023] KEELC 19864 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE E013 OF 2022
JM ONYANGO, J
SEPTEMBER 21, 2023**

BETWEEN

CENTRE PARK PLAZA LTD PLAINTIFF

AND

RURAL HOUSING ESTATES LTD DEFENDANT

JUDGMENT

1. By a Plaint dated 14th February 2022 the plaintiff filed suit against the defendant seeking the following reliefs:
 - a. Specific performance to execute the requisite transfer documents in favour of the plaintiff, in default the defendant to avail the executed transfers within 7 days from the date of the judgment, the Deputy Registrar of this Honourable Court do execute the transfer documents in favour of the Plaintiff with regard to the following parcels of land on behalf of the Defendant:
 - i. Eldoret Municipality Block 15/325
 - ii. Eldoret Municipality Block 15/330 and
 - iii. Eldoret Municipality Block 15/332
 - b. Mesne profits for the three properties since 21st April 2011 when the purchase price was fully paid
 - c. Damages for breach of contract and loss of business for the aforesated three properties in lieu of or in addition to the order of specific performance.
 - d. Interest on the amount paid of Kshs.135, 000,000 at the rate of 24% in accordance with special condition No. 3 of the sale agreement from 26th April 2011 until payment in full.



- e. Interest on (a), (b) and (c) at court rates from the date of filing suit until payment in full.
 - f. Any such other or further relief as this Honourable Court may deem fit to grant.
2. Despite being served with the Plaint and Summons to enter appearance, the Defendant neither entered appearance nor filed a Defence. The matter therefore proceeded by way of Formal proof.

Plaintiff's Evidence

3. The Plaintiff called one witness, Gileskumar Chandarkant Gheewala who testified as PW1. He introduced himself as a director of Centre Park Plaza (Plaintiff). He adopted his witness statement as his evidence in chief. He then produced the documents enumerated in the Plaintiff's List of Documents as Plaintiff's exhibits 1-20.
4. He told the court that the Plaintiff and defendant entered into a sale agreement dated 20th August 2010 for the sale of 5 parcels of land being Eldoret Municipality Block15/ 323, 323 325, 330 and 332 at an agreed purchase price of Kshs.135,000,000/=. The plaintiff paid the full purchase price by three installments as evidenced by plaintiff's exhibits 5, 6 and 7. He explained that the Plaintiff obtained a loan of Kshs.100,000,000 from Commercial Bank of Africa to pay part of the purchase price while the balance was financed from the plaintiff's own resources.
5. It was his evidence that despite the Plaintiff having performed its part of the contract, the Defendant had failed to transfer the five properties to the Plaintiff and had sold two of the said properties to Associated Securities Limited. The Plaintiff is therefore claiming the remaining three properties known as Eldoret Municipality Block 15/ 325, 330 and 332. He stated that the sale agreement provided that in the event of breach, the vendor would pay the purchaser interest on the payments made to the vendor at the rate of 24% per annum until completion. He told the court that the plaintiff had paid the land rates for the suit properties for the period 2012 to 2021 as evidenced by Plaintiff's exhibits 9, 10, 11 and 12. Owing to the refusal to transfer the suit properties, the plaintiff lodged a caveat on suit properties in 2015 as indicated in the Certificates of Official Search produced as Plaintiff's exhibits 14 and 15.
6. It was his evidence that as a result of the defendant's failure to transfer the suit properties, the plaintiffs had been denied the use of the suit properties yet they were still repaying the loan they had taken to finance the purchase of the suit properties. He said that they had taken long to file suit because the defendant had expressly acknowledged that the plaintiffs were the owners of the suit properties.
7. With the above evidence, the plaintiff closed its case after which submissions were filed on behalf of the plaintiff.

Plaintiff's Submissions

8. In her submissions, Ms Kyeva learned counsel for the plaintiff summarized the plaintiff's evidence and framed the following issues for determination:
 - i. Whether there is a valid contract between the Plaintiff and the Defendant.
 - ii. Whether the Defendant breached the contract.
 - iii. Whether the Plaintiff is entitled to the remedies sought.
 - iv. Whether the instant suit is time-barred.
9. With regard to the validity of the contract counsel submitted that the sale agreement dated 30th August, 2010 is in conformity with section 3(3) of the [Law of Contract Act](#). She submitted that the sale



agreement produced by the plaintiff met the above-mentioned requirements as it was in writing, it was signed by both parties and it was witnessed by one George Kilonzo who was present when the agreement was signed. The said agreement contains the names of the parties, the description of the property and the purchase price as well as conditions of sale. She relied on the case of Solomon Ndegwa Kuria v Peter Nditu Gitau (2019) Eklr.

10. On whether there was a breach of contract counsel submitted that among the terms of the contract was a term that if the vendor was unable to obtain a clear title by the completion date, he may ask for extension but in that event the vendor would pay the purchaser interest on the payments made to the vendor on account of the purchase price at 24% per annum until completion.
11. It was her contention that the Defendant had failed to fulfill its obligations under the agreement by delivering the completion documents to the purchaser to facilitate the transfer and it was therefore in breach of the agreement.
12. Counsel submitted that the plaintiff was entitled to an order of specific performance as the it had performed its part of the contract. She relied on the case of Gurdev Singh Birdi & Narinder Singh Ghatora as Trustees of Ramgharia Institute of Mombasa v Abubakar Madbhuti (1997) eKLR for the proposition that for one to be entitled to an order of Specific performance one must demonstrate that he has performed or is willing to perform all the terms of the agreement.
13. She contended that the grant of specific performance would not cause any hardship to the defendant as the suit properties are registered in the name of the defendant and they had by their letter dated 13th July 2021 (Plaintiff's exhibit 17) acknowledged that the original title documents ought to be released to the plaintiff. It was her further contention that the contract did not suffer from any defect. She relied on the case of Kisumuwalla Industries Ltd v Pan Asiatic Commodities PTE Ltd & Another (1997) eKLR where the court held that in a contract relating to the sale of land, the law takes the view that the purchase of a particular piece of land or a particular house cannot on the vendor's breach obtain a satisfactory substitute so that specific performance is available to him.
14. Additionally, counsel submitted that the plaintiff was entitled to mesne profits as it had not been able to develop or use the suit property since April 2011 when it paid the last installment of the purchase price ad it had paid the land rates since 2012.
15. It was counsel's submission that the Plaintiff was entitled to interest at 24% from the date of payment of the last installment in accordance with Special Condition 3 of the Sale Agreement.
16. On whether the suit is time-barred, counsel submitted that since the last installment was paid on 21st April, 2011, time started running on the said date. However, the plaintiff's counsel had engaged in protracted correspondence with the Defendant's counsel regarding the completion documents and by their letter dated 13th July, 2021 the defendant's counsel had indicated that they would release the said documents to the plaintiff's counsel to enable them complete the transfer. It was therefore her contention that the defendant was estopped from going back on his word pursuant to the doctrine of equitable estoppel as provided in section 39 of the Limitation of Actions Act.

Issues for Determination

17. Having carefully and anxiously considered the plaint, evidence and submissions on record as well as the law and relevant authorities, the following issues fall for determination:
 - i. Whether there is a valid contract between the plaintiff and the defendant
 - ii. Whether this suit is statute- barred and unenforceable under the Limitation of Actions Act.



- iii. Whether the Defendant breached the contract.
- iv. Whether the Plaintiff is entitled to the reliefs sought

Analysis and Determination

- 18. The first issue for determination is whether there is a valid contract between the plaintiff and the defendant.
- 19. The sale agreement on which this suit is based is dated 20th August 2011 and the same was produced by PW1 as Plaintiff's exhibit 1.

Section 3(3) of the [Law of Contract Act](#) provides as follows;

S.3(3) 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 was present when the contract was signed by such party;

Provided that this sub-section shall not apply to a contract made in the course of the [Auctioneers Act](#) (Cap 526) nor shall anything in it affect the creation of a resulting, implied or constructive trust.

- 20. As submitted by counsel for the plaintiff, the sale agreement is in conformity with the provisions of Section 3(3) of the [Law of Contract Act](#) as it is signed by both parties and attested by a witness who was present when the parties signed the agreement. The said agreement clearly describes the property being sold, the purchase price and the conditions of sale. It does not suffer from any legal defect and I find and hold that it is valid.
- 21. The second issue is whether the suit is statute barred and unenforceable under the [Limitation of Actions Act](#). Section 4 of the Limitations of Actions Act provides as follows:

4(1) the following actions may not be brought after the end period of six years from the date on which the cause of action arose-

- a. Actions founded on contract

Section 7 of the said Act provides that:

7. An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, it is first accrued to some person through whom he claims to that person.

- 22. The suit herein is for recovery of land based on a contract dated 20th August 2010. For purposes of the claim based on contract, this means that the suit should have been filed within a six -year period from the date of agreement, that is by 20.8.2016. On the other hand, the claim for recovery of land should have been filed before the expiry of 12 years, that is by 20.8.2022. The claim for recovery of land is therefore not time-barred.
- 23. However, the question is whether the plaintiff's claim is tenable in so far as it seeks to enforce a land sale contract. Based on the evidence placed before the court and the relevant provisions of the [Limitation of Actions Act](#), the answer to the above question is in the affirmative. I say so because PW1 testified that



the delay in filing suit was occasioned by the fact that they had been engaging in correspondence with the defendant and he had acknowledged that the plaintiffs were the owners of the suit properties.

24. On 13th July 2021 the Defendant wrote a letter to its advocates as follows:

Our ref: CPP/RHE/Titleds/13721/cm

July 13, 2021

Akenga Kimutai & Associates Advocates

K.V.D.A Plaza 5th Floor

Box 2842 30100

Eldoret

Dear Mr. Akenga,

RE: Titles for Plot Number 15/325, 15/330 AND 15/332

Reference is made to the original titles for the following plots:

1. Block 5-Plot No. 15/325
2. Block 8- Plot No. 15/330
3. Block 9- Plot No. 15/332

We have received a letter from Centre Park Plaza Ltd demanding for release of the original titles to enable them proceed with transfer of the plots.

We are disappointed with the fact that you have not been able to get the titles.

As you know we urgently need these titles to enable us complete the transfer as per our agreement.

We hereby instruct you to formally write to National Bank of Kenya with an intention to take legal action for their refusal to release the titles of the above mentioned plots.

We look forward to your immediate response.

Yours faithfully,

Elesh Gheewala

Director

25. The above letter constitutes an acknowledgment within the meaning of section 23 of the *Limitation of Actions Act*.

26. Additionally, the Defendant, having made the plaintiff believe that it would release the original title documents to the plaintiff is estopped from pleading limitation.

27. Section 39 of the *Limitation of Actions Act* provides as follows:

1. A period of limitation does not run if
 - a. There is a contract not to plead limitation or
 - b. That the person attempting to plead limitation is estopped from doing so.
2. For purposes of sub-section (1) estopped includes estopped by equitable or promissory estoppel.



In *Titus Muiruri Doge v Kenya Cannery Ltd (1988)* A.B Shah J adopted the words of Denning LJ when he observed as follows:

“It is a principle of justice and equity. It comes to this: when a man by his words or conduct has led another to believe that he may safely act on the faith of them-and the other does act on them-he will not be allowed to go back on what he has said or done when it would be unjust or inequitable for him to do so”

28. In the case of *Edward Kimondola Kinyutu v Bank of Baroda (Kenya) Ltd (2020 eKLR)* the Court faced with a similar situation held as follows:

“I am of the view that in the circumstances of this case, it would be inequitable to allow the defendant to raise the defence of time bar. I am of the opinion that as long as the defendant’s assurances to the plaintiff that it would transfer the suit property to the plaintiff remained open, the limitation period could not run against the plaintiff by virtue of section 39(1)(b) of the *Limitation of Actions Act*. Due to the foregoing, it is my finding that the plaintiff’s suit is not time barred”.

29. In the instant case, the plaintiff produced correspondence to show that the defendant had all along expressed its willingness to hand over the title documents to the Plaintiff so as to facilitate the transfer of the suit properties. There is correspondence acknowledging the fact that the plaintiff had paid the land rates for the period 2012-2021 on the basis of the agreement between the plaintiff and the defendant. It is therefore my finding that by virtue of section 39 (1) (b) of the *Limitation of Actions Act*, the Defendant is estopped from pleading limitation and the suit is therefore not time-barred.

30. On whether the Defendant breached the contract, it was PW1’s uncontroverted evidence that they entered into an agreement dated 30th August, 2010 for the sale of 5 parcels of land at an agreed purchase price of Kshs.135,000,000/= . The Plaintiff paid the purchase in full but despite several promises and assurances that it would transfer the properties to the plaintiff it had failed to release the original title documents to facilitate the transfer. It is therefore clear that that the Defendant breached the contract by failing to transfer the suit properties to the plaintiff.

31. Arising from the said breach of contract the plaintiff seeks various remedies. The main relief sought is an order of specific performance. This court’s jurisdiction to grant an order of specific performance is guided by common law principles. An order of specific performance decrees the due completion of a contract in its proper form. As a common law principle, the court will not decree specific performance where evidence is tendered to the effect that the vendor is unable to convey the land. This principle is informed by the philosophy that it is the essence of the remedy of specific performance that the purchaser should obtain the land. Secondly, an order of specific performance is an equitable remedy and is granted at the discretion of the court. This discretion is governed by certain principles. For instance, the remedy will not be granted if its enforcement will entail great hardship or if the vendor’s title is in doubt or if its enforcement would entail protracted or difficult litigation. The essence of an order of specific performance is that the contract remains in force and the parties are required to discharge their obligations under the contract. Lastly, even where a contract is valid and enforceable, specific performance will not be ordered where there is an adequate alternative remedy.

32. In the case of *Gurdev Singh Birdi & Narinder Singh Ghatora as Trustees of Ramgharia Institute of Mombasa v Abubakar Madbhuti (1997) eKLR* the court was of the view that for one to be entitled to an order of Specific performance one must demonstrate that he has performed or is willing to perform all the terms of the agreement.



33. In the instant case the plaintiff led evidence to show that, it had performed its part of the contract by paying the full purchase price. The plaintiff further demonstrated that the grant of specific performance would not cause any hardship to the defendant as the suit properties are registered in the name of the defendant and that the Defendant had by their letter dated 13th July, 2021 (Plaintiff's exhibit 17) acknowledged that the original title documents ought to be released to the plaintiff. It was also demonstrated that the contract does not suffer from any defect.
34. As to whether there is an alternative remedy, I am concur with the case of Kismuwalla Oil Industries Ltd v Pan Asiatic Commodities PTA Ltd (supra) where the court was of the view that in a contract relating to the sale of land or a house, in the event of the vendor's breach the purchaser cannot easily find a satisfactory substitute. Specific performance would therefore be the most appropriate remedy.
35. With regard to the prayer for mesne profits, the Plaintiff did not adduce any evidence to show how much it had lost as a result of the defendant's failure to transfer the suit property and I find that the same has not been proved.
36. Regarding interest on the purchase price. The contract executed by the parties provides under clause 3 of the Special conditions that
- “if the vendor is unable to obtain a clear title by the completion date, the vendor may ask for extension of completion date but in the event, the vendor will pay the purchaser interest on the payments made to the vendor on account of purchase price at 24% per annum till payment in full”
37. As the Defendant did not complete the sale within 90 days as agreed, the plaintiff is entitled to interest on the sum of Kshs. 135,000,000 at 24% per annum from 21.4.2011 until payment in full.
38. Having held that the plaintiff is entitled to the interest aforesaid, there would be no need to award general damages.
39. In the final analysis it is my finding that the plaintiff has proved its case on a balance of probabilities. I therefore enter judgment for the plaintiff in the following terms:
- a. An order of Specific Performance is hereby issued compelling the defendant to execute the requisite transfer documents in favour of the plaintiff within 45 days from the date of this judgment, in default, the Deputy Registrar of this Honourable Court shall execute the transfer documents in favour of the Plaintiff with regard to the following parcels of land on behalf of the Defendant:
 - i. Eldoret Municipality Block 15/325
 - ii. Eldoret Municipality Block 15/330 and
 - iii. Eldoret Municipality Block 15/332
 - b. The defendant shall pay interest on the sum of Kshs.135,000,000/= at the rate of 24% per annum from 26th April 2011 until payment in full
 - c. The costs of this suit shall be borne by the Defendant.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 21ST DAY OF SEPTEMBER, 2023

.....

J.M ONYANGO



JUDGE

In the presence of;

Miss Kyeva for Miss Thiongo for the Plaintiff

No appearance for the Defendant

Court Assistant: Mr. Oniala

