



REPUBLIC OF KENYA



**Ngaruiya v Ng'ang'a (Environment & Land Case E049 of 2022)
[2023] KEELC 21566 (KLR) (14 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21566 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE E049 OF 2022
MN GICHERU, J
NOVEMBER 14, 2023**

BETWEEN

MARY NJERI NGARUIYA PLAINTIFF

AND

TABITHA MUTHONI NG'ANG'A DEFENDANT

RULING

1. The Plaintiff seeks the following reliefs against the Defendant.
 - a. An order of specific performance directing the Defendant to perform all the obligations in the agreement for sale entered between the Defendant and the Plaintiff on or about 17/8/2016 and her respect to be performed to the effect that plot No 1880/Residential –Noonkopir T. Centre, suit land is duly transferred to the Plaintiff herein.
 - b. In the alternative to prayer (a) hereinabove
 - i. Special damages in the sum of Kshs. 1, 620,000/=.
 - ii. General and exemplary damages.
 - c. In default of (a) and (b) above the Deputy Registrar of this Court do execute all documents necessary for transfer and ownership of the suit property to the Plaintiff upon payment of the full purchase price.
 - d. An order of permanent injunction restraining the Defendant and any other person claiming proprietary interest, adverse to that of the Plaintiff, whether by herself, her servants and/ or agents or whosoever from constructing, transferring, letting or otherwise alienating or disposing of the suit land
 - e. Costs of the suit.



- f. Interest in (b) and (e) above at commercial rates.
2. The Plaintiff's case is as follows. On 17/8/2016 she entered into a sale agreement with the Defendant for the suit land. The purchase price was Kshs 2.5 million. She paid the Defendant Kshs 1,250,000/- on the date of the agreement. Within 60 days, she had paid the defendant a total of Kshs 1, 620,000/-. She was unable to pay the balance as agreed. She asked the Defendant for an extension of time and the Defendant agreed.
3. On 18/2/2018, the Plaintiff received a letter from the Defendant in which the latter said that she was no longer interested in selling the suit land. She then asked the Defendant for a refund of the partly paid purchase price. The Defendant promised to refund within a period of 90 days but failed to do so. By 10/3/2022, the Defendant had not refunded the paid purchase price even after being issued with a demand letter and notice of intention to sue. It is then that she filed this suit.
4. In support of her case, the Plaintiff filed the following evidence.
 - i. Witness statement.
 - ii. Copy of agreement for sale of the suit land.
 - iii. Other documents.
5. The Defendant did not enter judgment or file a defence. The case proceeded by way of formal proof.
6. At the trial the Plaintiff testified on oath, adopted her witness statement and documents. The Plaintiff's counsel filed written submissions dated 16/10/2023.
7. I have carefully considered all the evidence adduced by the Plaintiff. I have also considered the whole record and I find that the following issues arise in this suit.
 - i. Whether specific performance is an appropriate order in this case.
 - ii. Whether special damages have been proved.
 - iii. Whether there is any other remedy available to the Plaintiff.
8. On the first issue, I find that the order of specific performance is not appropriate in this case. The remedy of specific performance compels the wrongdoer in a contract to carry out his contractual obligations. He is thus forced to complete the transfer of land rather than offer damages. Since this remedy is discretionary, it will only be granted where the Plaintiff convinces the court that damages are not adequate in the circumstances. The Plaintiff must also prove that the subject matter of contract is rare and unique and it is the object rather than its value that the Plaintiff desires. See *Gathuthi Hotel v Fazal Ilahi* (1957) EA 17.
9. In addition to the above the Plaintiff must approach the court with clean hands free from any blame on his part. If there is any evidence of fraud, mistake, misrepresentation or illegality on their part, the order will not issue. Laches or delay will also defeat a claim for specific performance. See *Mzee Bin Ali v Allibhoy Nurboy* 1 KLR 58.
10. In this case, the Plaintiff has stated in her own witness statement at paragraph 7 that she did not perform her part of the contract within 60 days as required by clause 14 of the sale agreement dated 17/8/2016. By 18/2/2018, about 1 ½ years after the agreement she was still in breach. From her own admission, it is obvious that the Plaintiff is not entitled to the order of specific performance. Not only is she at fault for breach of the agreement but she is also caught up by laches for bringing this action more than



five years from the date of the agreement. The Plaintiff has also failed to say anything about complying with clause 18 of the agreement as regards arbitration.

11. On the second issue, I find that special damages, have not been proved. Since the Plaintiff is the party in breach of the sale agreement, she cannot be awarded any damages.

12. Finally on the third issue, I find that clause 14 of the sale agreement provides the remedy where:-

This agreement and everything herein contained shall be null and void for all purposes and 10% of purchase price shall be forfeited as liquidated damages to the vendor should the purchaser fail to comply with the completion date herein before stated”.

The date of the agreement was 17/8/2016. The completion date as per clause 1.3 was 60 days from the date of agreement. By 18/10/2016 the Plaintiff was in breach. By her own evidence she is entitled to the partly paid purchase price Kshs. 1, 620,000/- less 10% of the purchase price which is Kshs 250,000/- which equals Kshs 1, 370,000/- (One Million, three hundred and seventy thousand only).

For the above stated reasons, I award the Plaintiff Kshs 1, 370,000/= only. No costs will be awarded because the Plaintiff has not proved that she complied with the arbitration clause.

It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 14TH DAY OF NOVEMBER, 2023.

M.N. GICHERU

JUDGE

