



Kyule v Jilani (Defending in Capacity as the Administrator of the Estate of David Gona Nguma) (Environment & Land Case 116 of 2015) [2023] KEELC 22343 (KLR) (19 December 2023) (Judgment)

Neutral citation: [2023] KEELC 22343 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 116 OF 2015
MAO ODENY, J
DECEMBER 19, 2023**

BETWEEN

FRANSISCA WAYUA KYULE PLAINTIFF

AND

MARY NYAMVULA JILANI (DEFENDING IN CAPACITY AS THE ADMINISTRATOR OF THE ESTATE OF DAVID GONA NGUMA) DEFENDANT

JUDGMENT

1. By a Plaint dated 16th July 2015 the Plaintiff herein sued the Defendant seeking the following orders:
 - a. Order of permanent injunction restraining the defendant either by himself, servants and/or agents or any persons acting under him from trespassing, encroaching, interfering, constructing, alienating and/or in any way dealing with the land subdivision number 10719/257, 10719/264, 10719/265 Malindi within Kilifi County the subject premises herein.
 - b. Specific performance
 - c. Costs and interests of the suit.
 - d. Any other relief this honourable court may deem fit to grant.

Plaintiff's Case

2. PW1 Fransisca Wayua Kyule adopted her Witness Statement dated 26th November 2021 and produced as PEX 1-20 a bundle of documents as per the consolidated list of documents.
3. PW1 stated that the Defendant is the registered owner of the suit property known as parcel Number 10719/264 at Maisha Mapya, Malindi within Kilifi County which he agreed to sell to PW1 vide an



indenture executed on 10th November 2003 at a consideration of ksh 320,000 where PW1 put up an Academy known as St. Cecilia Academy.

4. PW 1 further testified that in 2004, she informed the Defendant that she was ready to purchase the other two plots namely, plot Nos. 10719/257 and 10719/256 whereby she partially paid ksh 300,000/ but the Defendant changed the amount payable to ksh 350,000/ and subsequently to ksh 650,000/ for each plot.
5. It was PW1's evidence that she went ahead, constructed a permanent building, and was in the process of constructing another structure that the Defendant was aware of but never raised any complaint.
6. PW1 also stated that she entered into another agreement dated 30th January 2009 where they agreed with the Defendant that she would pay a total of ksh 1,300, 000/ for the two plots leaving a balance of ksh 1,000,000/ having paid a deposit of ksh 300,000/.
7. PW1 further stated that she leased the premises to Christopher Kambi and Priscilla Sidi Kitsao trading as Great News Academy who offered to pay the remaining balance of ksh 1,000,000/= as was stipulated in the further sale agreement dated 30th January 2009 but the Defendant refused to accept the payment.
8. On cross-examination, PW1 told the court that she has an agreement dated 10th April 2003 for plot No 264 which she legally acquired and made full payment. She however stated that there was no sale agreement for parcel Nos 10719/256 and 10719/257. She also told the court that she further entered into an agreement in respect of the remaining plots for a consideration of ksh 650,000/- per plot, which she conceded that the same was never paid. It was her evidence that the agreement had a default clause at paragraph 3, which provided that the vendor would retake possession of the suit property.

Defendant's Case

9. DW1 Mary Nyamvula Jilani the wife of David Gona (deceased) adopted her Witness Statement dated 27/9/2021 as her evidence in chief and produced as DEX 1-12 a bundle of documents as per the list of documents dated 6/8/2015 and DEX 13-14 documents as per the further list of documents dated 27/9/2021.
10. On cross-examination, DW1 told the court that there is no dispute in respect of plot No. 10719/264 as the Plaintiff paid fully for it but the dispute is in respect of plot Nos. 10719/256 and 10719/257 which the Plaintiff never paid for.
11. It was DW1's testimony that the Plaintiff built some incomplete structures on the suit parcels of which she was told to remove but did not comply. DW1 urged the court to dismiss the Plaintiff's suit with costs.

Plaintiff's Submissions

12. Counsel submitted that both agreements dated 10th April 2003 and 30th January 2009 were valid as they met the conditions of a valid contract as per section 3(3) of the *Contract Act* and relied on the case of *Solomon Ndegwa Kuria v Peter Nditu Gitau* [2019] eKLR.
13. On the issue whether the court should order for specific performance of the contract, counsel submitted that the Plaintiff had paid a deposit of ksh 300,000/ and left a balance of ksh 1000,000/- which the Plaintiff was unable to pay due to financial constraints but was still interested in the suit property thus be allowed to complete the payment through an order for specific performance.



14. Counsel relied on the cases of *QPKA Limited v Kenyatta Hospital Association (KHA) T/A Nairobi Hospital* [2021] KEHC 282 (KLR) and *Pius Kimaiyo Langat v Co-operative Bank of Kenya* [2017] eKLR

Defendant's Submissions

15. Counsel reiterated the evidence of the parties and submitted that the Plaintiff breached the terms of the agreement by not paying the full purchase price for the additional two plots.
16. Counsel further submitted that the default clause at paragraph 3 of the agreement provided that the vendor would repossess the property if the balance of the purchase price is not paid within the stipulated period.
17. Counsel also relied on Section 39 of the *Land Act* 2012, which provides for the vendor's right to regain possession of the land upon breach of a contract for sale of land.
18. Mr. Fondo submitted that the court cannot rewrite contracts for parties and relied on the case of *National Bank Of Kenya Ltd v Pipeplastic Samkolit (k) Ltd & another*[2001] eKLR and urged the court to dismiss the Plaintiff's suit with costs to the Defendant.

Analysis And Deterination

19. The issues for determination are whether the Plaintiff is entitled to an order of a permanent injunction, whether the Plaintiff is in breach of the agreement dated 30th January 2009 and whether an order of specific performance can issue against the Defendant.
20. It should be noted that the Plaintiff filed an application dated 16th July 2015 seeking for orders of injunction against the Defendant restraining him from interfering with the suit plots pending the hearing and determination of this suit. The court heard the application and only allowed an injunction restraining the Defendant from interfering with Plot No 10719/264, which has no dispute as the Plaintiff paid for it in full. The Defendant also admitted the position that the Plaintiff paid for the plot in full.
21. It follows that a permanent injunction can only issue in respect of plot No 10 719/264 and not the two plots namely Plot Nos 10719/256 and 10719/ 257 which the Plaintiff has admitted to not paying in full leaving a balance of ksh 1000,000/ unpaid.
22. On the second issue whether the Plaintiff was in breach of the agreement dated 30th January 2009, the agreement was that the Plaintiff was to pay ksh 650,000/ per plot making a total of ksh 1,300,000/ of which she paid Khs. 300,000/ leaving an unpaid balance of ksh 1000, 000/. The Plaintiff admitted that she did not pay the balance due to financial difficulties.
23. Paragraph 3 of the sale agreement stipulated that :

“ Should the Purchaser fail to pay the said balance of purchase price of Kenya shillings One Million (ksh 1,000,000/-) before the said new completion date then this sale and purchase will forthwith be repudiated and the vendor shall forthwith forfeit all monies paid by the Purchaser on account of the Purchase price aforesaid as liquidated damages and to declare this agreement to be rescinded, and thereupon the Vendor shall be entitled to enter and retake possession of the property subject of this agreement.”
24. The agreement was specific on the default clause and the Plaintiff admitted that she did not fulfil the terms of the agreement by making full payment of the purchase price.



25. The Law Dictionary Sixth Edition at page 63 defines the word breach as follows:

“Breach (of contract) a party’s failure to perform some contracted-for or agreed upon act, or his failure to comply with a duty imposed by law which is owed to another or to society.”

26. Section 39 of the *Land Act* provides that:

Vendor’s right to regain possession.

39. If, under a contract for the sale of land, the purchaser has entered into possession of the land, the vendor may exercise his or her contractual right to rescind the contract by reason of a breach of the contract by the purchaser by—

(a) resuming possession of the land peaceably; or

(b) obtaining an order for possession of the land from the court in accordance with the provisions of section 41.

27. The above Section and the default clause at paragraph 3 of the agreement dated 30th January 2009 gives the Defendant the right to resume possession of the two parcels of land that had not been fully paid for.

28. This leads me to the issue whether the Plaintiff is entitled to an order of specific performance, 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 settled 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 an adequate remedy specific performance may still be refused on the ground of undue influenced or where it will cause severe hardship to the Defendant.”

29. An order of specific performance is an equitable relief, which is discretionary and can only be granted where there is a valid enforceable contract. A court cannot grant such an order if the contract suffers from any illegality or unfulfilled terms of the contract. In this particular case, the purchase price was not paid in full as stipulated in the agreement and further the default clause provided for repossession of the suit parcels of land.

30. Similarly in the case of *Gurdev Singh Birdi & Narinder Singh Ghatoraas Trustees of Ramgharia Institute Of Mombasa v Abubakar Madhbuti* [1997] eKLR the court held that:

“the plaintiff must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action, However, this rule only applies to terms which are essential and considerable. The court does not bar a claim on the ground that the plaintiff has failed in literal performance, or is in default in some non-essential or unimportant term, although in such cases it may grant compensation.



31. Payment of a purchase price is an essential term of the contract and cannot be overlooked. The agreement had specific terms on what would happen upon default therefore the non-payment of purchase price in neither unimportant term nor non-essential.
32. These are the types of cases that can benefit from alternative dispute resolution like negotiation and mediation. The court urged the parties to try an out of court settlement but the parties were not able to agree on a settlement hence the hearing of the suit. The court therefore has to make a decision arising from the evidence and the documents produced.
33. The upshot is that the Plaintiff is only entitled to orders of injunction and specific performance in respect to plot No. 10719/264 where the Plaintiff made full payment of the purchase price and not Plot Nos. 10719/256 and 10719/257 which have an outstanding balance of ksh 1000,000/. The Defendant having admitted that she does not dispute that the Plaintiff is entitled to plot No 10719/264 is hereby ordered to transfer the same to the Plaintiff.
34. Each party to bear their own costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 19TH DAY OF DECEMBER 2023.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

