



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Environmental & Land Case 324 of 2012**

**GEOFFREY KINUTHIA NJOROGE.....APPLICANT**

**VERSUS**

**MACRO VENTURES DEVELOPERS LIMITED.....RESPONDENT**

**JUDGMENT**

This suit is filed by way of Originating Summons under Order 37 Rule 3 and 7 of the Civil Procedure Rules 2010 and all enabling provisions of the Law and is dated 5<sup>th</sup> June, 2012. In it, the applicant seeks the following two prayers:

1)That the Respondent Macro Ventures Developers Limited be ordered to supply the applicant with all completion documents for parcel of Land known as RUIRU/RUIRU EAST BLOCK 7/531 (the “Suit Property”) forthwith and in default an order do issue authorizing the Deputy Registrar to execute the said documents.

2)Costs be provided for:

The Originating Summons is supported by the Supporting Affidavit of GEOFFREY KINUTHIA NJOROGE, the applicant herein. In the said Supporting Affidavit, the applicant swore as follows:

Ø That he purchased the suit property from the Respondents way back in 2011.

Ø That he paid the agreed purchase price of Kshs 3 million to the applicant in full.

Ø That since then he has been waiting for the Respondent to release to him the following completion documents in vain:

i)Original Title Deed.

ii)Copy of Pin Certificate.

iii)Passport Size Photographs.

iv)Clearance Certificate.

v)Duly Executed Transfer Forms.

vi)Consent to Transfer

Ø That the applicant and the Respondent entered into a Sale Agreement on 8<sup>th</sup> February, 2012 in which the Respondent acknowledged having received the full purchase price and undertook to process the title in the applicant's favour on or before 31<sup>st</sup> March, 2012.

Ø That the promise made by the Respondent in the Sale Agreement was not honoured.

Ø That in light of this, the applicant requested his Advocates to do a demand letter to the Respondent which was done but it did not elicit any response from the Respondent.

Ø That his plans to develop the suit property had been frustrated by the failure of the Respondent in furnishing him with the completion documents.

In their Replying Affidavit sworn by Henry Ngugi Karanja dated 2<sup>nd</sup> July 2012, the Respondent replied to the applicants originating summons by stating as follows;

Ø That it is true that the Respondent and the Applicant entered into an Agreement for sale of the suit property.

Ø That the said Agreement discloses in clear terms that the Respondent was in the process of being registered as the owner of the suit property.

Ø That the registered owner of the suit property has allowed the Respondent to subdivide the Land and the applicant had paid for MC 18 Plots 1 & 2.

Ø That the registered owner of the Land out of which the suit property would be carved out had frustrated the Agreement between the applicant and the Respondent by failing to register the Applicant as the registered owner of the suit property.

Ø That the Respondent was willing to sell to the Applicant an alternative piece of land to replace the suit property.

Ø That for the above cited reasons, it was not possible for the Respondent to furnish the Applicant with the completion Documents for the suit property.

The Originating Summons proceeded to full hearing on 12<sup>th</sup> February, 2013 when both Counsel for the Applicant and the Respondent made their submissions herein. In their submissions, Counsel for the Applicant reiterated that there was an Agreement for Sale of the suit property between the two parties in which the Respondent acknowledged receipt of the full purchase price of Kshs 3 million and undertook to supply the applicant with the completion documents. The Counsel for the Applicant stated that the Respondent did not produce proof relating to its frustration by the registered proprietor of the suit property which led to their inability to subsequently transfer the suit property to the applicant. Applicant's Counsel submitted that the Respondent's Replying Affidavit merely contained admissions to the Applicant's submissions and allegations.

On her part, Counsel for the Respondent stated that she was not disputing entering into an Agreement for sale of the suit property with the Applicant and receiving the full purchase price of Kshs 3 million. She however submitted that her client was unable to furnish the applicant with the completion Documents because it did not have title to the suit property as yet. She submitted that the Respondent was still in the process of getting registered as the proprietor of the suit property and this process had not been completed. She submitted that the registered proprietor of the suit property had caused the frustration of the Agreement for sale between the parties. She however stated that the Respondent was offering the Applicant an alternative piece of Land.

In reply thereto, Counsel for the Applicant stated that no reasons had been advanced to explain the reason why the registered proprietor of the suit property had failed to transfer the suit property to the Respondent and that the Agreement for sale was still in force and binding upon the Respondent. He further stated that being a Land matter, then orders for specific performance should be granted as prayed by the Applicant.

This is a relatively straightforward case in the sense that the Respondent has admitted all the Applicants allegation. The only point of departure between these two parties is on the remedy to be granted by this Court in view of the circumstances facing the Respondent making it unable to fulfill its part of the Agreement for sale of the suit property. On the part of the applicant, he requests for an order of specific performance compelling the Respondent to supply to him the completion documents. It is worth noting that the applicant did not even make an alternative prayer of being refunded the purchase price paid by him for the suit property. On its part, the Respondent act impossibility of supplying the completion documents owing to frustration by the registered proprietor of the suit property. On its part, the Respondent is offering the Applicant an alternative parcel of Land. The applicant is not willing to accept this offer. That leaves us with only one issue to deliberate upon and this is whether this Court shall grant the Applicant with the order of Specific Performance.

The remedy of Specific Performance involves the Court in issuing an order directing one of the parties to a contract to carry out his or her obligations. The sanction for a failure to comply is that the person concerned will be in contempt of Court and liable to fines and imprisonment as a consequence. Since the remedy is an equitable one, it is discretionary, unlike damages which are available as of right. This means that a claimant is not entitled to the order simply as a result of proving that the other party is in breach of its obligations. Once this has been established, the Court will then decide whether it is appropriate in this particular case that the order should be made. Over the years the Court have developed a number of rules about the use of the order for Specific Performance. Two of them are relevant in this particular case.

First is the matter of adequacy of damages. One of the reasons why the remedy of Specific Performance developed is that, in certain situations, damages will be an inadequate remedy. If no pecuniary loss can be established or if it is impossible to quantify, this would mean that there would be no effective sanction for a breach of contract, in the absence of the order for Specific Performance. In *Harnett V Yielding* (1805) 2 Sch & Lef 549, Lord Redesdale said

“Unquestionably, the Original foundation of these decrees was simply this, that damages would not give the party the compensation to which he was entitled; that is, it would not put him in a situation as beneficial to him as if the agreement were specifically performed.”

Second is the issue of hardship. If the granting of an order will cause disproportionate hardship to the Defendant, the Court will refuse it. In the case of *Reliable Electrical Engineers (K) Limited V. Mantrac Kenya Limited* (2006) Eklr, Maraga J stated as follows:

“Even where damages are not adequate remedy, Specific Performance may still be refused on the ground of undue influence or where it will cause severe hardship to the Defendant.”

Turning back to our case, it is true that the Respondent needed to delve deeper in its defence to explain both to the Applicant and to this Court the full reasons why it was not able to obtain title to the suit property from the registered proprietor thereof. These reasons would have shed light on this case and would have enabled this Court determine whether or not an Order for Specific Performance would effectively address the situation. All that has been stated by the Respondent is that it did not have title to the suit property and entered into the Agreement for sale with the applicant in anticipation of getting title. This notwithstanding, this Court must arrive at a conclusion of this suit in the absence of that information. In aid of this Court I wish to cite the case of *Amritlal Versus City Council of Nairobi* (1982) KLR 76 where it was stated as follows:

“The appellant’s prayer for Specific Performance had no probability of success. It would be impossible for the City Council to comply with an order for Specific Performance, since it would not be able to transfer the suit Land to the appellant as the legal title was held by the Government. The effect of an order of Specific Performance would put the Respondent in a position in which it would not obey the order of the Court.”

As matter of stand right now, the Respondent does not have title to the suit property. This is the position that the Court must recognize as it considers whether or not to grant the order for Specific Performance. In light of this fact, this Court cannot issue an order for Specific Performance reason being that, there is the very great possibility that it will be impossible for the Respondent to comply with such an Order. The Court makes this finding while at the same time bearing in mind that Land is unique and irreplaceable with an alternative piece of Land.

Owing to the position enunciated above, this Court finds that it will decline the Applicant's prayer for Specific Performance. It appears that the Applicant's remedy lies in damages but since this was not prayed, this Court cannot award it.

The suit is hereby dismissed. No order as to costs.

SIGNED AND DELIVERED THIS 28<sup>TH</sup> DAY OF MARCH.2013

MARY M. GITUMBI

JUDGE