Nagilah & 2 others v Gitau & another (Environment & Land Case 223 of 2013) [2022] KEELC 3221 (KLR) (25 May 2022) (Judgment)

Neutral citation: [2022] KEELC 3221 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ENVIRONMENT & LAND CASE 223 OF 2013

DO OHUNGO, J

MAY 25, 2022

BETWEEN

JOHN WANDERA NAGILAH ..... 1ST PLAINTIFF

PETER OGHOLA MAKANGA ..... 2ND PLAINTIFF

JOYCE GESARE BOSIRE (ADMINISTRATIX OF THE ESTATE OF GEORGE BOSIRE OGETO) ..... 3RD PLAINTIFF

AND

PETER NJUGUNA GITAU ..... 1ST DEFENDANT

NJUPE ENTERPRISES LIMITED ..... 2ND DEFENDANT

JUDGMENT

1. This suit was commenced through plaint dated 1st March 2013 and filed on the same date. The plaintiffs later filed Amended Plaint dated 28th May 2015 in which they averred that at all material times, the 1st defendant was the registered proprietor of the parcel of land known as title number Nakuru Municipality Block 15/956, hereinafter referred to as the 'suit property' and that the 2nd defendant was its sole agent. That in or about the year 2006, the 1st defendant caused the suit property to be subdivided into small portions for purposes of sale and that vide a sale agreement dated 5th March 2007, the 1st defendant through the 2nd defendant sold to George Bosire Ogeto (deceased) a portion of the proposed subdivision marked as plot No. 9 at a consideration of KShs 350,000.

2. The plaintiffs further averred that vide a sale agreement dated 5th March 2007, 1st defendant through the 2nd defendant also sold portions of the proposed subdivision marked as Nos. 6 and 8 respectively to the 1st and 2nd plaintiffs at a consideration of KShs 350,000 each. That it was a term of the contract that the 1st defendant would obtain all consents and transfer the suit property to the plaintiffs and that despite paying the entire consideration or a substantial part of the consideration, the 1st defendant

failed to complete the execution and registration of the proposed subdivision plans and consequently failed to transfer the subdivided properties to the plaintiffs.

3. The plaintiffs therefore sought judgment against the defendants jointly and severally for the following orders:

    a. An order of specific performance compelling the defendants to complete the execution and registration of the proposed subdivision plan in title No. Nakuru Municipality Block 15/956 and consequently transfer and issue the Plaintiffs with their individual title deeds.

    b. An order of temporary injunction restraining the defendants either by themselves, their servants and or agents servants (sic) howsoever, from selling, disposing, alienating or in any way dealing with the Plaintiffs' entitlement in title No. Nakuru Municipality Block 15/956 pending determination of the suit.

    c. An order of permanent injunction restraining the defendants, either by themselves, servants and or agents servants howsoever, from selling, disposing, alienating or in any way dealing with the Plaintiffs' entitlement in title No. Nakuru Municipality Block 15/956 pending determination of the suit.

    Ca) Or alternatively An order of refund of all monies paid under the agreements;

    d. General Damages;

    e. Costs.

4. The defendants filed their statement of Defence and Counter Claim on 5th August 2015. They admitted having agreed to sell the plots to the plaintiffs and added that the plaintiffs failed to comply with all the terms of the sale agreements and that they were in breach of the agreements having failed to pay the full purchase price within 90 days from the date of the said sale agreements. That the plaintiffs failed to pay the requisite expenses for processing of leases and other related expenses as the defendants were only required to meet the survey expenses. They further averred, without prejudice, that the sale agreements dated 28th November 2006, 5th March 2007 and 13th March 2007 are null and void and incapable of enforcement save for refund of part payments paid by the plaintiffs or their representatives.

5. The defendants therefore prayed for judgment against the plaintiffs jointly and severally for:

    a. A declaration that the plaintiffs (now defendants) were in breach of the sale agreements and that the said agreements are null and void and unenforceable in law.

    b. An order for the Refund of the monies paid by the plaintiffs (now defendants) less 10% being liquidated damages.

    c. Costs and interest of this counter claim.

    d. Any other relief which this Honourable Court would deem fit and just to grant.

6. On 17th November 2020, the 3rd plaintiff's case was marked withdrawn with no order as to costs.

7. At the hearing, Peter Oghola Makanga, the 2nd plaintiff, testified as PW1. He stated that around January 2007, he noticed that there were plots being sold within his neighbourhood at Kisulisuli Estate opposite Kisulisuli Primary School, by the 1st defendant, from whom he previously bought another plot. That upon discussing with Odda Auma, his wife, they purchased plot No. 8 from the 1st defendant who was trading as Njupe Enterprises. PW1 further stated that he later realized that the 1st

plaintiff, who lives in the United Kingdom and is his brother-in-law, was also interested in purchasing one of the said plots. PW1 and his wife volunteered to purchase one plot on behalf of the 1st plaintiff.

8. PW1 went on to state that he had previously done a search of the plot which he had bought and believed that the other plots being sold were genuine as well. On 13th March 2007, PW1 and his wife visited the 1st defendant at his office at Hyrax Building in Nakuru Town where the 1st defendant offered them plot No. 6 for the 1st plaintiff at a non-negotiable price of KShs 350,000. The 1st plaintiff sent KShs 300,000 to PW1's wife through Western Union, which amount was paid to the 1st defendant on 13th March 2007 in cash. The 1st defendant issued a receipt and an agreement for Sale of Land dated 13th March 2007 was signed wherein PW1's wife signed as the purchaser. He added that the balance of KShs 50,000 was paid by his wife on 5th September 2007 at the 1st defendant's office and a receipt was issued.

9. PW1 further stated that the 1st defendant promised to obtain for them a title within two weeks but failed to do so despite reminders and promises. Under cross examination and re-examination, he admitted that he has not paid the full purchase price and that he still owes KShs 40,000.

10. Oddah Auma Makanga testified as PW2. She stated in her witness statement, which she adopted as part of her evidence in chief, that the 1st plaintiff is her brother who resides in the United Kingdom and that the 2nd plaintiff is her husband. That the 1st plaintiff requested her to find for him a plot within her neighbourhood. That she went with her husband to the 1st defendant who offered them plot no 6. That the 1st plaintiff had sent her KShs 300, 000 through Western Union on 13th March 2007 which she paid to the 1st defendant that same day in cash in the presence of her husband, leaving a balance of KShs 50,000. That she also signed a Sale Agreement on that same day. That on 5th September 2007 she went with her husband and paid the balance of KShs 50, 000 to the 1st defendant and a receipt was issued. That the 1st defendant promised to get for them a title in the name of the 1st plaintiff within two weeks but failed to do so despite constant reminders and promises.

11. In her oral testimony which is somehow at odds with her witness statement, she stated that the balance of KShs 50,000 was paid by the 1st plaintiff personally in 2007 when he was in Kenya. She also stated that her husband paid KShs 310,000 and was unable to pay the balance of KShs 40,000 because he fell ill. Under cross examination, she stated that her husband is yet to pay the full purchase price and that on expiry of 90 days from the date of the agreement, he had paid only KShs 110,000. That he paid a further KShs 200,000 after 3 years from the date of the agreement.

12. The plaintiffs' case was then closed.

13. Peter Njuguna Gitau testified as DW1. He stated that he is a businessman who buys and subdivides land under a real estate business known as Njupe Enterprises. That the suit property was his plot which he bought with a view to subdividing then selling. That on 5th March 2007, he entered into an informal sale agreement with the 2nd plaintiff who purchased plot No. 8 at KShs 350,000. That the 2nd plaintiff paid KShs 70,000 on execution of the agreement and the balance was to be paid within 90 days. He added that as at the date of his testimony, the 2nd plaintiff had only paid KShs 310,000 made up of the KShs 70,000 paid on 5th March 2007, KShs 40,000 paid on 25th May 2007 and KShs 200,000 paid on 22nd March 2010. He further testified that he finished the process of subdivision, that approvals for the subdivision were issued by the Commissioner of Lands and that letters of allotments were issued for which he paid. That as at the date of his testimony he was in the process of obtaining leases for each of the plots.

14. DW1 further testified that the 1st plaintiff paid the full purchase price and that he is willing to transfer to him plot number 6 which has since been given a new number Nakuru Municipality Block 15/991.

That as regards the 2nd Plaintiff, he is waiting for this matter to be concluded after which he will revoke the agreement. That he is willing to refund the purchase price to the plaintiffs if they are willing to receive it. He added that the sale agreements were informal since the parties were to appear later before an advocate. He denied being in breach and insisted that the plaintiffs are the ones in breach and that he is entitled to liquidated damages of 10% from them as per the agreements.

15. The Defence case was closed. Parties thereafter filed and exchanged written submissions.

16. The plaintiffs filed their submissions on 4th June, 2021. They cited Section 3 (3) of the *Law of Contract Act* and Section 38 (1) of the *Land Act* and argued that the agreements executed between the parties are valid since they were duly signed by the 1st defendant and the two plaintiffs and witnessed by two witnesses in compliance with the said provisions. The plaintiffs further argued that there was no clause in the agreements that made time of essence and that even if there was such a clause, the fact that the defendant was paid and accepted payment after lapse of 90 days waived such a requirement. That the defendant did not adduce evidence of any notice of intention to make time of the essence ever having been issued to the plaintiffs. They thus submitted that the defendant is in breach and urged the court to grant specific performance by ordering him to transfer the suit property to the plaintiffs subject to the plaintiffs paying stamp duty and registration fees and the 2nd plaintiff paying KShs 40,000 being the balance of the purchase price. Reliance was placed on the case of *Reliable Electrical Engineers (K) Ltd v Mantrac Kenya Limited* [2006] eKLR. The plaintiffs further submitted that in the event the court considers ordering a refund of the purchase price, the same should be awarded with interest at court rate from the date the suit was filed until payment in full.

17. The defendants filed their submissions on 30th July, 2021 and argued that the 1st plaintiff never testified in support of his case and did not personally sign the verifying affidavit contrary to the requirements of Order 4 Rule 1 (2) and (3) as well as Order 1 Rule 12 of the *Civil Procedure Rules*. Further, that the basis of the 1st plaintiff's claim over plot No. 6 is the agreement dated 13th March 2007, which agreement is between the 1st defendant and Odda Auma Makanga and does not mention that the plot was being purchased for the 1st plaintiff as a beneficial owner. That there is no privity of contract between the defendants and the 1st plaintiff and that the agreement itself does not meet the requirements of Section 3(3) of the *Law of Contract Act*. They urged the court to strike out the suit with costs for being incompetent.

18. The defendants further submitted that the 2nd plaintiff breached the sale agreement by failing to pay the full purchase price and even making the part payments as late as 3 years contrary to the agreed 90 days. They argued that the 2nd plaintiff breached the agreement and should therefore be refunded the amount paid less 10% of the purchase price as per clause 8 of the agreement. They further argued that the process of issuance of leases and titles is within the hands of the Ministry of Lands as opposed to the defendants and that the defendants ought not be compelled to do that which is not within their power. They concluded by arguing that the plaintiffs' suit is incompetent owing to invalid summons to enter appearance and should be dismissed with costs and that the defendant be allowed to refund monies paid in terms of the counterclaim.

19. The plaintiffs filed further submissions on 28th September 2021 wherein they argued that the defendants' submissions as to the issue of verifying affidavit and summons to enter appearance were neither pleaded in the defence nor raised at trial and that the defendants are precluded from raising them at the submissions.

20. I have considered the parties' pleadings, evidence and submissions. The issues that arise for determination are whether there is privity of contract between the defendants and the 1st plaintiff,

whether there was a valid written agreement between the parties, if so, whether there was any breach of the contract and lastly, whether the reliefs sought should issue.

21. There is no dispute that the 1st defendant was the proprietor of the parcel of land known as Nakuru Municipality Block 15/956 or the suit property. That much is confirmed by the Certificate of Lease dated 8th January 2003. The 1st defendant has himself admitted such ownership. There is equally no dispute that on 5th March 2007, the 1st defendant and the 2nd plaintiff executed a written sale agreement pursuant to which the 1st defendant sold to the 2nd plaintiff a portion of the suit property known as plot number 8 at a purchase price of KShs 350,000. The 2nd plaintiff paid KShs 70,000 on 5th March 2007 and the balance was agreed to be paid within 90 days from 5th March 2007. Pursuant to clause 8 of the agreement, it was mutually agreed that any party who fails to comply with any of the terms of the agreement would "suffer liquidated damages of 10% of the money herein ...." The agreement was duly signed by both the 1st defendant and the 2nd plaintiff and was witnessed by two witnesses who also signed it.

22. Further, there is no dispute that on 13th March 2007, the 1st defendant and Odda Auma Makanga executed a written sale agreement pursuant to which the 1st defendant sold to Odda Auma Makanga a portion of the suit property known as plot number 6 at a purchase price of KShs 350,000. It was agreed that Odda Auma Makanga pays KShs 300,000 on signing of the agreement and the balance was to be paid within 90 days from 13th March 2007. The agreement whose terms were generally similar to those of the one dated 5th March 2007, also had a clause 8 with similar terms on liquidated damages. Equally, the agreement was duly signed by both the 1st defendant and Odda Auma Makanga and was witnessed by two witnesses who also signed it.

23. Was there privity of contract between the defendants and the 1st plaintiff?Blacks Law Dictionary, 11th Edition defines privity of contract as "the relationship between the parties to a contract, allowing them to sue each other but preventing a third party from doing so." If there is no privity of contract between the 1st plaintiff and the defendants then there would be no basis upon which the 1st plaintiff would sue the defendants in relation to the agreements.

24. It will be noted from the summary of the agreements above that there is no reference to any agreement executed between the 1st plaintiff and the defendants. Instead, both plaintiff's witnesses testified that there was a collateral agreement between the 1st plaintiff and Odda Auma Makanga pursuant to which she purchased plot number 6 on behalf of the 1st plaintiff. The 1st plaintiff provided the funds in respect of the purchase price. The 1st defendant was aware of the collateral agreement since he issued a receipt dated 5th September 2007 in the name of the 1st plaintiff and also stated in his testimony that "the 1st plaintiff paid the full purchase price. His plot is available." Simply put, the 1st defendant was aware that the agreement dated 13th March 2007 was entered into for the benefit of the 1st plaintiff. Existence of a collateral agreement is one of the exceptions to the doctrine of privity of contract. See *Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & another* [2015] eKLR. I therefore find that even though there was no privity of contract between the defendants and the 1st plaintiff, the 1st plaintiff validly filed this suit in view of the collateral agreement.

25. Was there a valid written agreement between the parties? The defendants have contended that the agreements are invalid in view of the provisions of Section 3 (3) of the *Law of Contract Act* and Section 38 (1) of the *Land Act*. Section 3 (3) of the *Law of Contract Act* provides:

> 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 is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the *Auctioneers Act* (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.

26. Section 38 (1) of the *Land Act*, 2012 is in similar terms. Further Section 38 (2) of the *Land Act*, 2012, has a proviso that subsection (I) shall not apply to any agreement or contract made or entered into before the commencement of the Act. It is worth noting that the two agreements that are the subject of this suit were entered into in the year 2007, long before the commencement of the *Land Act*, 2012. That aside, the two agreements meet the criteria of the twin provisions of Section 3 (3) of the *Law of Contract Act* and Section 38 (1) of the *Land Act*, 2012 since they are in writing, are signed by all the parties thereto and the parties' signatures are attested to by witnesses who were present at execution. I therefore find and hold that the agreements are valid.

27. The next issue for determination is whether there was any breach of the contracts. The terms of the agreements were clear enough and I have highlighted them above. A key obligation of the purchasers was to pay the purchase price in full within 90 days. The 2nd plaintiff conceded in his testimony that he did not pay the balance of the purchase price within the agreed period and that he still owes KShs 40,000. His last payment was on 22nd March 2010, over 3 years after the agreement. He is clearly in breach of the agreement.

28. Regrading the 1st plaintiff, the 1st defendant has conceded that he paid the full purchase price and that he is entitled to his plot. That aside, there is evidence on record that the 1st plaintiff paid KShs 300,000 on execution of the agreement dated 13th March 2007. Beyond acknowledging full payment, the defendants have not adduced any evidence to show any breach on the part of the 1st plaintiff as regards his payment obligations. I therefore find and hold that the 1st plaintiff is not in breach of the agreement.

29. The plaintiffs have sought judgment against the defendants for an order of specific performance. The principles applicable to the remedy of specific performance were summarised by Gicheru J.A. in *Gurdev Singh Birdi & Narinder Singh Ghatora as Trustees of Ramgharia Institute of Mombasa v Abubakar Madhbuti* [1997] eKLR as follows:

> It cannot be gainsaid that the underlying principle in granting the equitable relief of specific performance has always been that under all the obtaining circumstances in the particular case, it is just and equitable so to do with a view to doing more perfect and complete justice. Indeed, as is set out in paragraph 487 of Volume 44 of Halsbury's Laws of England, Fourth Edition, a plaintiff seeking the equitable remedy of specific performance of a contract:
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> "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.

> Where a condition or essential term ought to have been performed by the plaintiff at the date of the writ, the court does not accept his undertaking to perform in lieu of performance, but dismisses the claim."
>
> .... When the appellants came to court seeking the relief of specific of the agreement, they had not performed their one essential part of the agreement. Namely; payment of the balance of the purchase price of the suit property. Indeed, right up to the conclusion of the proceedings in the superior court, they had not done so. In those circumstances, no court of equity properly directing its mind to the same would have considered it just and equitable to grant them the equitable relief of specific performance of the agreement with a view to doing more perfect and complete justice.

30. In view of the foregoing discourse, the 1st plaintiff who has discharged his obligations pursuant to the agreement is entitled to the relief of specific performance. The 1st defendant confirmed in his testimony that his plot is available and has since been given a new number being Nakuru Municipality Block 15/991. In line with clause 5 of the agreement, the 1st plaintiff will have to shoulder the obligations of paying for registration fees in respect of the transfer as well as paying stamp duty.

31. The situation is however totally different as regards the 2nd plaintiff who has so far not paid the full purchase price and is therefore in breach of the agreement. He is thus not entitled to the relief of specific performance.

32. Under prayers (b) and (c) of the amended plaint, the plaintiffs sought injunctions pending determination of the suit. Those prayers are spent and cannot issue. Further, under prayer (ca) of the amended plaint, the plaintiffs have sought, in the alternative, an order of refund of all monies paid under the agreements. In line with prayer (b) of the counterclaim and clause 8 of the agreements, I will order a refund of the KShs 310,000 paid by the 2nd plaintiff less 10% thereof being liquidated damages. In other words, the 2nd plaintiff is entitled to a refund of KShs 279,000.

33. No interest was sought in the amended plaint and I will therefore not award any. Regarding costs, both sides of the litigation have had some measure of success. I will therefore make no order on costs.

34. In view of the foregoing discourse, I make the following orders:

    a. An order of specific performance is hereby issued compelling the first defendant to complete the execution and registration of the proposed subdivision plan in title No. Nakuru Municipality Block 15/956 and to transfer plot number 6 which is also known as title number Nakuru Municipality Block 15/991 to the first plaintiff.

    b. Judgment is entered in favour of the second plaintiff and against the first defendant for KShs 279,000 (Two Hundred Seventy-Nine Thousand).

    c. No order on costs.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 25TH DAY OF MAY 2022.

D. O. OHUNGO

JUDGE

Delivered through electronic mail in the presence of:

Court Assistant: E. Juma