



**Odhiambo & another v Ochieng (Environment & Land Case
240 of 2014) [2022] KEELC 3566 (KLR) (13 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 3566 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 240 OF 2014**

**A OMBWAYO, J
MAY 13, 2022**

BETWEEN

LUCY AUMA ODHIAMBO 1ST PLAINTIFF

PAMELA UDO MBECHE 2ND PLAINTIFF

AND

**MARTHA CHIMWENE IN TRUST FOR KEVIN MINANGA
OCHIENG DEFENDANT**

JUDGMENT

1 Lucy Auma Odhiambo and Pamela Udo Mbeche came to this court by way of originating summons against Martha Chimwene in trust for Kevin Minanga Ochieng praying for Judgment against the defendant that:

1. The defendant be compelled to specifically perform their part of the sale agreement facilitating transfer of all rights, title and interests in the property known as LR No 15983/66 situate within Kisumu County, Kenya Re House number 48 within the Republic of Kenya to plaintiffs.
2. Defendant be ordered to pay plaintiffs rental income (Kshs 50,000 pm) accruing from the Suit Property for the period commencing the agreed date of completion of Sale Agreement.
3. In the alternative Defendant do refund the plaintiffs the sums of Kshs 2,000,000 (two million) being payments made to the Defendant by the Plaintiffs as down payment towards the purchase of the property known as LR No 15983 situate within Kisumu County, Kenya Re House number 48 within the republic of Kenya together with interest thereon at commercial rates from 26th April, 2011 (should be 24/5/2013) until payment in full.



4. In any case the Defendant do pay the agreed liquidated damages of 10% of the purchase price being Kshs 330,00 (three hundred and thirty thousand shillings).
5. The defendant be condemned to pay the costs of these proceedings together with interests on (2), (3) (starting 21/05/13) and (4) above herewith.
- 2 When the matter came up for hearing, the plaintiff attended but the defendant failed to attend. The plaintiff testified that on or about May 21, 2014, the parties herein entered into a sale agreement and signed a transfer of property known as LR No 15983/66 situate within Kisumu County, Kenya Re House number 48 within the republic of Kenya to plaintiffs for a consideration of Kshs 3, 300,00 (three million three hundred thousand).
- 3 That completion date was on or about 21st August 2013 being 90 days of signing of the said agreement. The plaintiffs met their obligations under the contract depositing Kshs 2,000,000 (two million) as per the agreement. the defendant has however to date failed to facilitate their part of the agreement.
- 5 That as a consequence the defendant's breach of contract, the plaintiffs have to date acquired neither Title nor possession of the material property and despite plaintiffs being desirous and ready to complete the transaction.
- 6 That the said sale agreement expressly provides for the orders prayed for herein.
- 7 That despite demand and notice as provided in the foresaid agreement, the defendant denies, neglects and or refuses to comply with their obligations.
- 8 That there is no previous or pending suit touching on the issues herein between the parties herewith. The plaintiffs continue to be prejudiced by the defendants breach of the sale agreement terms.
- 9 The plaintiffs filed submissions whose gravamen was that on or around May 21, 2014 the plaintiffs entered into a Land Sale agreement with the defendant (in trust for Kevin Minanga Ocheing) to transfer of all rights, title and interests in the property known as LR No 15983/66 situate within Kisumu County, Kenya Re House number 48 within the Republic of Kenya to plaintiffs for a consideration of Kshs 3,300,000.
- 10 The sale agreement that the plaintiff seeks to rely on meets the requirements of a contract of sale of land. The plaintiff has alleged that he entered into a sale agreement with the defendant for purchase of the suit property. Further that the same was reduced into writing and signed by all the parties.
- 11 Section 3 (3) of the [Contract Act](#) provides that;
 - 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 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.



- 12 The sale agreement is produced as exhibit by the plaintiff and that the same is in writing and is signed by the parties witness by respective advocates. The sale agreement thus met the requirements of section 3 (3) of the Contract Act.
- 13 Further the agreement for sale contains the names of the parties, the description of the property, the purchased price and the conditions thereto. A look at the said sale agreement confirms that the same is a valid sale agreement which is enforceable by the parties.
- 14 See the case of *Nelson Kivuvani v Uyda Komora & another*, Nairobi HCCC No 956 of 1991 where the court held that:-
- “the agreement for sale of land which contains the names of the parties, the number of the property, the purchase price and the conditions attached thereto, the obligations, express or implied, of each of the parties and signed and witnessed by two witnesses who signed against their names amount to a valid contract”.
- 15 In compliance to the terms of the sale agreement, on or about May 24, 2013 the plaintiffs deposited Kshs 2,000,000 with the defendant’s Advocate account MA Ochanji-Opondo & Co Advocates, Chase Bank account number 01510306xxxxx Swift Code CKKENKENA as per paragraph 2.1 of the sale agreement, well within the completion date.
- 16 The completion date was on or about August 21, 2013 being 90 days of signing of the said agreement as per paragraph 1.1a of the sale Agreement.
- 17 In wilful default, blatant disregard and breach of the foresaid contract, to date the defendant has not met any of their obligations as per the agreement and in particular paragraphs 2.3 and 4 of the sale agreement.
- 18 Following the defendant’s wilful breach, the plaintiffs are prejudiced and continue to suffer anxiety and loss of profits and interest from denial of possession and title of the foresaid property known as LR No 15983/66 situate within Kisumu County, Kenya Re House number 48 despite the plaintiffs complying with their obligations as under the sale agreement.
- 19 The plaintiff testified producing documents to support the assertions. the plaintiff’s evidence is unchallenged/uncontroverted.
- 20 Section 107 of the Evidence Act cap 80 of the laws of Kenya states that:-
- “Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”.
- 21 In the case of *Shaneebal Limited... vs County Government of Machakos* (2018) eKLR, where the Court cited the case of *Karuru Munyororo vs Joseph Ndumia Murage & another*, Nyeri HCCC No 95 of 1988 where it was held that:-
- “The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaintiff and in the absence of the defendant’s and or their counsel to cross examine her on evidence, the plaintiff’s evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon.”
- 22 On remedies the plaintiff contends that a search confirms that the suit property is registered in the names of the defendant.



- 23 The fear that defendant intends to re-sell the suit property to a higher bidder prompted the plaintiffs to rush before this honourable court and interlocutory conservatory orders issued.
- 24 That the subject matter is a house; courts have held that land is unique/irreplaceable.
- 25 No prejudice or hardship shall befall the defendants in completing the sale agreement.
- 26 The plaintiffs have always been willing and able to complete the transaction as agreed.
- 27 It is in the interest of justice that he orders of specific performance issue forthwith.
- 28 In the Case of *Reliable Electrical Engineers Ltd v Mantrac Kenya Limited* (2006) eKLR wherein Justice Maraga (as he then was) stated that:-

“Specific performance like any other equitable remedy is discretionary and the court will only grant it on well laid 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 are adequate remedy specific performance may still be refused on the ground of undue influenced or where it will cause severe hardship to the defendant.”

- 30 However the plaintiff seeks the prayer for specific performance being most suited and just to the circumstances of this matter. There is no prejudice in the defendant completing and transferring the title as per the sale agreement.
- 31 It is a further express term of the agreement (para 5.4) that the defaulter would pay 10% of the purchase price as agreed liquidated damages, this amounts to a sum of Kes 330,000.00
- 32 That defendant be ordered to pay plaintiffs rental income (Kshs 50,000/= pm) accruing from the suit property for the period commencing the agreed date of completion of Sale Agreement.
- 33 The open market rental value for the suit property is Kshs 50,000 per month. The completion dated was on or about 21/08/2013 being 90 days of signing of the said agreement as per paragraph 1.1a of the sale agreement.
- 34 The plaintiffs should have been in possession of the suit property at the completion dated of 21/08/2013 earning rental income from the suit property at the rate of Kshs 50,000.00 per month for a duration of 98 months as at November 2021.
- 35 The rents lost as a consequence of the defendant’s aforesaid breach amounts to Kes 4,900,000.00.
- 36 On the other hand, the defendant have been benefiting/profiting from his breach of contract collecting all the rents after on top of receiving the deposit of the purchase price.
- 37 It is just that the plaintiffs are compensated from the date of agreed completion until the time defendant hands over possession. The said sum of Kshs 4,900,000.00 as a November 2021 would be sufficient compensation for recovery of lost rents/mense profits.



38 Kindly award the plaintiff costs of this suit caused by the continuous and intentional defaults of the defendant.

39 The plaintiff likewise prays for an award of interest at court rates from the date of filing this suit until settlement.

40 I have considered the evidence on record and the submissions on record and do find that the plaintiff has demonstrated that she had a valid and legal contract with the defendant who breached the same and therefore the plaintiff is entitled to the reliefs sought.

41 I do grant prayers:-

1. The Defendant be compelled to specifically perform their part of the Sale Agreement facilitating transfer of all rights, title and interests in the property known as LR No 15983/66 situate within Kisumu County, Kenya Re House number 48 within the Republic of Kenya to plaintiffs.
2. Defendant is hereby ordered to pay plaintiffs rental income (Kshs 50,000 pm) accruing from the suit property for the period commencing the agreed date of completion of Sale Agreement to date.

Costs of the suit to the defendant. Orders accordingly.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 13th DAY OF MAY, 2022

ANTONY OMBWAYO

JUDGE

This Judgment has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.

