



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Kimani v Kimani (Environment & Land Case 824 of 2017)
[2022] KEELC 57 (KLR) (12 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 57 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 824 OF 2017**

BM EBOSO, J

MAY 12, 2022

BETWEEN

KASAMA KIMANI PLAINTIFF

AND

JANE WANGECHI KIMANI DEFENDANT

JUDGMENT

1. Through a plaint dated 6/8/2010, the plaintiff seeks, among other reliefs, an order of specific performance compelling the defendant to transfer to him land parcel number Sigona/932. He also seeks a permanent injunctive order restraining the defendant against dealing with the land. The formal contract upon which the plaintiff's claim is founded is a handwritten agreement dated 30/4/2009, in which the land sold was described as "Sigona 934". There is common ground that the agreed purchase price under the said handwritten agreement was Kshs 700,000 and the said amount was paid by the plaintiff to the defendant in full. The land control board consent which the parties subsequently procured related to parcel number Sigona/946, a parcel of land which the defendant contends was a subdivision surveyed out of parcel number Sigona/934. The plaintiff contends that the actual land sold to him by the defendant was Sigona/932 and that the description of the land subject matter in the sale agreement as "Sigona 934" was an error. On his part, the defendant contends that the actual land sold to the plaintiff was a portion of parcel number Sigona/934 and that the said portion was surveyed out of parcel number Sigona/934 as Sigona/946. One of the key issues to be determined in this judgment is whether, in the circumstances of this case, the equitable remedy of specific performance is available to the plaintiff pursuant to the sale agreement dated 30/4/2009 and in relation to land parcel number Sigona/932.
2. The dispute in this suit was the subject of criminal proceedings in Kiambu CMC Criminal Case No. 1734/2009 in which, at the behest of the plaintiff, the defendant was charged with the offence of obtaining money through false pretences. Upon trial, the defendant was acquitted through a judgment dated 22/3/2013. A perusal of the court record, including the judgment of the Chief Magistrate Court,



reveals that complaints of bias were levelled by the plaintiff against various public servants involved in the investigation, prosecution and adjudication of the criminal dispute. I will summarize the parties' respective cases before I make a brief analysis and determination of the dispute.

Plaintiff's Case

3. The plaintiff's case is contained in his plaint dated 6/8/2010; his witness statement filed in court on 6/2/2013; his oral evidence tendered during trial on 15/11/2021; the 20 documents produced as exhibits during trial; and the written submissions dated 29/11/2021, filed by his advocates, M/s Mwaniki Kariuki & Company Advocates.
4. In summary, the plaintiff's case is that the defendant was and is still the registered proprietor of land parcel number Sigona/932. He approached the defendant and the defendant agreed to sell to him the said parcel of land in early April 2009. On 30/4/2009, he entered into a sale agreement with the defendant for the sale of the said parcel of land and he paid to the defendant the agreed purchase price of Kshs 700,000 in full. However, during the signing of the agreement, the said parcel of land was erroneously "misspelt" as "Sigona 934" instead of "Sigona/932". He contends that the parcel he was shown by the defendant and which he purchased was Sigona/932 and not any other parcel.
5. The plaintiff adds that the defendant was to transfer to him parcel number Sigona/932 but refused to do so and attempted to transfer to him two other parcels, namely, Sigona/934 and Sigona/946, as alternatives to the land initially shown and sold to him, an offer which he declined on the ground that the said parcels were not owned by the defendant. It is the plaintiff's case that subsequent to the signing of the agreement, the defendant gave him the original title relating to parcel number Sigona/932. He still holds the said original title to date.
6. In paragraph 10 of his plaint, the plaintiff pleaded for an order of specific performance compelling the defendant to transfer to him parcel number Sigona/932. In the same paragraph, he pleaded for the alternative relief of refund of the purchase price together with interest. He did not, however, replicate the above alternative relief in the last paragraph of the statement of claim [plaint].
7. In his testimony during cross-examination, he stated that there was no written agreement between them relating to parcel number Sigona/932. He added that the defendant did not tell him the parcel number of the land she was selling to him at the time of negotiating. He further stated that he disagreed with the defendant on the actual identity of the land that the defendant was selling to him. The plaintiff further stated that they went to the Land Control Board and the Board issued to them a consent dated 4/6/2009, relating to parcel number Sigona/946. Shown an application to the Land Control Board relating to parcel number Sigona/946, he confirmed that he signed the said application. He added that he personally paid Kshs 6,000 to the Board in relation to the consent. He further stated that the sale agreement in respect of which he seeks an order of specific performance relates to parcel number Sigona/934. Lastly, he stated that the defendant gave him the original title relating to parcel number Sigona/932.
8. In re-examination, he testified that the defendant showed him the land he was selling to him. He added that the parcel number which was captured in the sale agreement was uttered by the defendant and that the defendant is the one who gave him the original title relating to parcel number Sigona/932.
9. In their written submissions dated 29/11/2021, the plaintiff's advocate argued that the plaintiff had satisfied the criteria upon which an order of specific performance is granted. Counsel added that there was sufficient evidence demonstrating that the defendant offered to sell to the plaintiff parcel number Sigona/932 and that it was clear to both parties that the land subject matter of the sale agreement was parcel number Sigona/932. Counsel submitted that the plaintiff had discharged his obligations under



the sale agreement. Counsel urged the court to grant the plaintiff the order of specific performance together with a permanent injunctive order and costs of the suit.

Defendant's Case

10. The defendant's case is contained in her statement of defence dated 14/4/2020; her witness statement dated 25/9/2020; the witness statement of Samuel Kinyanjui Kimani dated 25/9/2020; her oral evidence tendered during trial on 15/11/2021; the oral evidence of Samuel Kinyanjui Kimani tendered during trial on 15/11/2021; the 14 documents produced as exhibits during trial; and the written submissions filed by her advocates, M/s Gicheha Kamau & Co Advocates, dated 17/12/2021.
11. In summary, the defendant's case is that parcel number Sigona/932 is her homestead where she resides with her married children and their families. The plaintiff is her neighbour. In April 2009, she approached the plaintiff for advice on how to procure a bank loan to buy a school bus for her children who were offering transport services to her tenant who runs a school on a portion of parcel number Sigona/932, M/s Pink Rose School. The defendant dissuaded her against taking a bank loan and advised her to instead sell one of her plots to raise the funds. She accepted the advice and decided to sell one of the subdivisions out of parcel number Sigona/934 at Kshs 800,000 to finance purchase of the bus. She took the plaintiff to the said subdivision and showed him the subdivision. Subsequently, the plaintiff informed her that his friends were selling a bus on a quick-sale basis and he [the plaintiff] was willing to purchase the subdivision which had been surveyed out of Sigona/934 at Kshs 700,000 to enable her purchase the bus. She accepted the offer.
12. It is the case of the defendant that on 30/4/2009, they wrote a sale agreement "while at Equity Bank" in Nairobi. At that point, she had not carried the title relating to the subdivision she was selling and she could not remember the subdivision parcel number. She could only remember the parcel number for the mother title which was Sigona/934. They agreed to describe the subject matter of the sale agreement as "a portion of Sigona/934" but the hand-written agreement which was subsequently formulated captured "Sigona 934" instead of "a portion of Sigona/934."
13. The defendant further contends that when she went home, having received full purchase price, she inadvertently handed to the plaintiff an envelope containing two titles: (i) title number Sigona/946 which relates to the plot she had shown and sold to the plaintiff; and (ii) title number Sigona/932 which relates to her homestead. It is her case that at that point, she did not realize that title number Sigona/932 was in the said envelope. She realized later.
14. The defendant contends that subsequently, they both went to the Land Control Board and signed application forms relating to parcel number Sigona/946. They left the application forms together with the original title and official search relating to parcel number Sigona/946 at the DO's Office. The Board subsequently held a meeting on 4/6/2009 and issued to them a consent to transfer, dated 4/6/2009, relating to parcel number Sigona/946. They thereafter collected the consent and proceeded to the Offices of M/s Seneti & Co Advocates, where they both executed transfer forms relating to parcel number Sigona/946. They agreed that the plaintiff was to go to her house later in the day to pick her photos and KRA PIN and at the same time return to her the original title relating to parcel number Sigona/932 which had been inadvertently put in the envelope that contained title number Sigona/946. The defendant contends that the plaintiff did not show up at all and has never returned title number Sigona/932.
15. It is the case of the defendant that parcel number Sigona/932 measures 1.32 acres and contains her 12 bedroomed permanent house; four permanent houses belonging to her children; a church; a school; and rental houses. It is her case that she has never entertained the thought of selling Sigona/932 and



that what she sold to the plaintiff was parcel number Sigona/946 which was a subdivision out of parcel number Sigona/934.

16. It is the defendant's case that the plaintiff decided to change his mind after they had obtained the consent and signed the transfer forms relating to parcel number Sigona/946 and has since used all ways and means to coerce and intimidate her into transferring to him parcel number Sigona/932 which was never the subject of the sale agreement. She adds that the plaintiff tried to use the police to procure a transfer of parcel number Sigona/932 to him, culminating in Kiambu CMC Criminal Case Number 1734 of 2009 where she was charged with the offence of obtaining money through false pretences. She was subsequently acquitted after trial. It is her case that during the criminal trial, she offered to convey to the plaintiff parcel number Sigona/946 or refund the purchase price in full but the plaintiff refused.
17. During cross examination, the defendant who testified as DW1 reiterated that the original titles relating to parcel numbers Sigona/932 and Sigona/946 were in the same envelope and both of them were given to the plaintiff inadvertently because she only intended to give the plaintiff title number Sigona/946. She further testified that title number Sigona/934 out of which parcel number Sigona/946 was surveyed has been the subject of litigation and the subdivisions were recently annulled by the Thika Environment and Land Court. She added that she had lodged an appeal in the Court of Appeal against the said decision. She further testified that at the moment, she cannot transfer title number Sigona 946 which was a subdivision out of title number Sigona/934 because title number Sigona/934 is the subject of an appeal in the Court of Appeal. She stated that there was an error in the sale agreement dated 30/4/2009 and they did not get the opportunity to draw a proper agreement because the plaintiff initiated criminal proceedings against her.
18. Samuel Kinyanjui Kimani testified as DW2. He is the defendant's son. In summary, his testimony was that, together with his four brothers and the defendant, they live on parcel number Sigona/932. In April 2009, as a family, they decided to dispose one of the plots owned by the 1st defendant to raise money to buy a bus for school transport business. When the plaintiff who had volunteered to identify a buyer to purchase the plot offered to buy the plot himself, he personally showed the plaintiff plot number Sigona/946 which was a subdivision out of parcel number Sigona/934. It was his evidence that parcel number Sigona/932 is the family's homestead and they had no intention of selling it because that is where they all live.
19. In her written submissions dated 17/12/2021, filed through the firm of Gicheha Kamau & Co Advocates, the defendant submitted that the agreement in respect of which the plaintiff seeks an order of specific performance relates to parcel number Sigona/934 and the same cannot be the basis of an order of specific performance relating to parcel number Sigona/932. Counsel for the defendant added that specific performance is a discretionary relief that is only granted where there is a valid and enforceable contract.
20. Counsel added that there was a material defect in the land sale contract in relation to the identity of the parcel of land sold and the material defect rendered the contract invalid and unenforceable. Counsel added that the alternative remedy of refund of the purchase price or conveyance of parcel number Sigona/946 were the appropriate remedies available. Counsel for the defendant further submitted that an order of specific performance relating to Sigona/932 would cause severe hardship because Sigona/932 is a family homestead where the defendant's children live with their respective families. Counsel urged the court to dismiss the suit and award costs of the suit to the defendant.



Analysis and Determination

21. I have considered the parties' pleadings, evidence and submissions. I have also considered the relevant legal frameworks and jurisprudence on the key issues falling for determination in the suit. Parties did not agree on a common set of issues to be determined by the court. From the parties' pleadings, evidence, and submissions, the following are the four key issues that fall for determination in this suit: (i) Whether the sale agreement dated 30/4/2009 constitutes a valid and enforceable land sale contract disposing parcel number Sigona/932; (ii) Whether the equitable remedy of specific performance is available to the plaintiff in relation to land parcel number Sigona/932; (iii) Whether the remedies of conveyance of parcel number Sigona/946 or refund of purchase price are available in the circumstances of this case; and (iv) What order should be made in relation to costs of this suit. I will make brief sequential pronouncements on the four issues in the above order.
22. The first issue is whether the sale agreement dated 30/4/2009 constitutes a valid and enforceable land sale contract disposing land parcel number Sigona/932. There is common ground that the agreement dated 30/4/2009 was a land sale agreement. There is, however, no agreement on the identity of the property which was the subject matter of the sale agreement. The agreement itself described the land subject as "Sigona 934". Evidence presented to the court indicates that at the time of signing the land sale agreement, parcel number Sigona/934 had already been subdivided into various sub-titles. There is further evidence that recently, Thika Environment and Land Court nullified the subdivisions and the decision has been challenged in the Court of Appeal.
23. Contracts relating to disposal of an interest in land are regulated by various statutes. One of the statutes is the [Law of Contract Act](#), [Cap 23] which contains the following framework at Section 3(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 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.
24. The import of the above legal framework is that, for there to be deemed to be a valid and enforceable land sale contract relating to parcel number Sigona/932, the plaintiff ought to demonstrate that there was a formal and duly executed agreement between him and the defendant, relating to parcel number Sigona/932. The handwritten agreement which the plaintiff relies on, though executed, relates to land that was described as "Sigona 934". It does not relate to Sigona/932. It cannot therefore be said that the plaintiff has satisfied the legal threshold stipulated by the law under Section 3(3) of the [Law of Contract Act](#).
25. The second key statute which governs land contracts is the [Land Control Act](#). Section 6 of the [Land Control Act](#) requires that an application for requisite consent be made and the consent be obtained from the Land Control Board within six months of the making of an agreement relating to a controlled



transaction. Sale of land is a controlled transaction within the meaning of that statute. Failure to obtain the consent of the land control board renders the transaction null and void.

26. In the present dispute, there is evidence that parcel number Sigona/932 falls within a locality that is subject to the provisions of the *Land Control Act*. Besides lack of a compliant formal land sale contract relating to parcel number Sigona/932, there is no evidence of any requisite consent applied for and obtained from the Land Control Board in relation to parcel number Sigona/932 and in pursuance of the contract dated 30/4/2009. The result is that, even if the court were to hold the view that the agreement dated 30/4/2009 related to parcel number Sigona/932, the same became null and void upon expiry of six months because the parties did not apply and obtain the requisite consent relating to parcel number Sigona/932.
27. The third reason why the court is of the view that there is no valid and enforceable land contract relating to parcel number Sigona/932 is that the agreement which the plaintiff is relying on relates to what the parties described in the agreement as parcel number “Sigona 934”. It does not relate to Sigona/932. There is no concurrence by the parties on the correct identify of the land that was sold to the plaintiff. Put differently, there is no convergence/meeting of the mind in relation to the exact identity of the land that was sold to the plaintiff pursuant to the agreement dated 30/4/2009. In the circumstances, I do not think there is a proper basis for holding that the agreement dated 30/4/2009 constitutes a valid and enforceable land sale contract relating to parcel number Sigona/932. Before I dispose this issue, I will comment on the subject of possession of the original title relating to Sigona/932 by the plaintiff because the fact of possession of the title is what the plaintiff relied on to make a claim over Sigona/932.
28. The defendant explained through evidence that the plaintiff got possession of the original title relating to Sigona/932 because it was in the same envelope with title number Sigona/946 and she inadvertently handed over the envelope to the defendant thinking that she was handing to him only title number Sigona/946. Indeed, parties to this suit subsequently executed consent application forms relating to Sigona/946 and obtained the requisite consent to transfer Sigona/946. They did not apply for any consent relating to Sigona/932. In my view, the above evidence supports the defendant’s case to the effect that the plaintiff obtained possession of the original title relating to Sigona/932 through inadvertency.
29. Consequently, the finding of the court on the first issue is that the sale agreement dated 30/4/2009 does not constitute a valid and enforceable land sale contract disposing parcel number Sigona/932.
30. The second issue is whether the equitable remedy of specific performance is available to the plaintiff in relation to land parcel number Sigona/932. The remedy of specific performance is an equitable relief. There are well established principles upon which jurisdiction to grant the remedy is exercised. Maraga J [as he then was] summarized the principles upon which jurisdiction to grant the remedy is exercised in *Reliable Electrical Engineers (K) Ltd v Mantrac Kenya Limited* [2006] eKLR as follows:

“Specific performance, like any other equitable remedy, is discretionary and the court will only grant it on the 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 defects, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or unenforceable. Even where 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 where damages are not an adequate remedy,



specific performance may still be refused on the ground of undue influence or where it will cause severe hardship to the defendant.”

31. The court has observed that there was no compliant, valid and enforceable land sale contract between the parties to this suit in relation to parcel number Sigona/932. Further, the court has made a finding to the effect that the sale agreement dated 30/4/2009 does not constitute a valid and enforceable land sale contract relating to parcel number Sigona/932. Taking the above finding together with the above principles into account, it follows that the court has no proper basis upon which to exercise jurisdiction to grant an order of specific performance in relation to parcel number Sigona/932. It is therefore the finding of the court that the equitable remedy of specific performance is not available to the plaintiff in relation to land parcel number Sigona/932.
32. The third issue is whether the remedies of conveyance of parcel number Sigona/946 or refund of the purchase price are available in the circumstances of this case. The defendant submitted that she was ready to convey to the plaintiff parcel number Sigona/946 or refund to the plaintiff the purchase price. Firstly, the plaintiff did not plead for conveyance of parcel number Sigona/946. Secondly, in her testimony during cross-examination, the defendant stated that subdivisions out of parcel number Sigona/934 had been nullified by this court and there was an appeal pending in the Court of Appeal. Parcel number Sigona/946 was one of the subdivisions that were nullified. For these two reasons, I do not think conveyance of parcel number Sigona/946 can be considered as an available and viable remedy in the circumstances of this case.
33. The plaintiff expressly pleaded for refund of the purchase price together with interest as an alternative remedy at paragraph 10 of the plaint. For avoidance of doubt, the plaintiff pleaded thus:

“ 10. The plaintiff’s claim against the defendant is for specific performance to compel the defendant to transfer all that parcel of land known as Sigona/932 in the alternative the defendant do refund to the plaintiff the purchase price together with interest.”
34. Although the above plea was not replicated in the last paragraph of the plaint, the court takes the view that the remedy was sufficiently pleaded and is properly available for the ends of justice. The plaintiff has had the money since 30/4/2009. She used the money to boost her sons’ school transport business. Although she claims that the defendant declined a refund, there is no evidence to suggest that she offered to deposit the money in court when this suit was filed. She has been aware that the offer to transfer parcel number Sigona/946 was not viable due to the litigation that subsisted, culminating in the nullification of the sub-titles surveyed out of parcel number Sigona/934. The result is that I will award the plaintiff interest on the purchase price at court rate from 1/5/2009.
35. On costs, this dispute was largely occasioned by the casual manner which the two parties adopted in formulating the sale agreement dated 30/4/2009. They co-authored the present dispute. I will, in the circumstances, order that parties bear their respective costs of the suit.

Disposal Orders

36. In the end, the court makes the following disposal orders:
 - a. The plaintiff’s claim for an order of specific performance relating to parcel number Sigona/932 is rejected on the ground that there was no compliant, valid and enforceable land sale contract relating to parcel number Sigona/932.
 - b. The defendant is decreed to refund to the plaintiff the purchase price paid to her in the sum of Kshs 700,000 together with interest at court rate from 1/5/2009 till the money is paid in full.



c. Parties shall bear their respective costs of the suit.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 12TH DAY OF MAY
2022**

B M EBOSO

JUDGE

In the Presence of: -

Mr Kariuki for the Plaintiff

Mr Gicheha Kamau for the Defendant

Court Assistant: Lucy Muthoni

