



**Mirema Drive Estate Ltd v Church of Jesus Christ of Latter Day Saints Registered Trustees
(Environment & Land Case 1049 of 2007) [2022] KEELC 2719 (KLR) (12 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 2719 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1049 OF 2007**

**LN MBUGUA, J
MAY 12, 2022**

BETWEEN

MIREMA DRIVE ESTATE LTD PLAINTIFF

AND

**THE CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS REGISTERED
TRUSTEES DEFENDANT**

JUDGMENT

1. Vide a plaint filed in court (HCC. No.509/2003) on May 29, 2003, the plaintiff sued the defendant claiming that they had bought the land parcel No. 7850/8 Mirema Drive from the defendant through a sale agreement dated June 4, 1997. They therefore sought orders inter alia to have the suit transferred to themselves. The plaint was amended and finally further amended on October 17, 2017 where the plaintiffs seek the following orders:
 - i. An order that upon payment in the sum of four million and five hundred thousand (Kshs. 4,500,000) by the Plaintiff to the Defendant or to the Registrar of the High Court of Kenya, the Defendant to transfer its interest in the property known as LR No. 7850/8 Mirema Drive, Nairobi to the Plaintiff within fourteen (14) days of the date of the making of such order and if the Defendant fails to do so within the said period of time, the said transfer to be executed by the Registrar of the High Court of Kenya and any such transfer to have such effect as if the Defendant executed it herself.
 - ii. Damages for loss of returns and for breach of contract between the 15th Day of October 1997, up to and including the date of execution of transfer of the suit property to the Plaintiff and for related loss and expense.
 - iii. An order that the Defendant and or its servants / agents remove themselves from the suit property within seven (7) days of the issuance of this order, failure in which the Defendant be



evicted therefrom by Court Bailiffs appointed by the Plaintiff and the said eviction process be supervised by the OCPD, Kasarani Division.

- iv. Costs and interest thereon at such rates as this Honourable Court may determine.
 - v. Any or any other order or relief that this Honourable Court may deem just and fit to grant.
2. The Defendant in their defence dated May 13, 2009(defence to amended plaint) averred that the plaintiff is the one who failed to complete the sale prompting the defendant to rescind the contract.

The evidence

3. The Plaintiff's side called one witness Lawrence Muriithi Mbabu(hereinafter known as PW1) an advocate of the High Court and the Managing Director of the Plaintiff. He adopted his witness statement dated November 14, 2019 as his evidence, and he produced the 11 documents in their list dated December 8, 2011 as exhibits 1-11. PW1 testified that they entered into a sale agreement with the defendant on June 4, 1997, whereby the Defendant was to sell land parcel No.LR No. 7850/8, Mirema Drive, Nairobi for a consideration of Kshs. 5,000,000. The Plaintiff paid a 10% deposit amounting to Kshs. 500,000 as per the terms of the agreement. The balance was to be paid on or before the completion date which ought to have been August 31, 1997.
4. Due to failure by the Defendant to complete the sale as per the stipulated time in the agreement, an extension was agreed on and the Defendant went ahead and gave the Plaintiff possession of the property. However, in year 2000, the Defendant ejected the Plaintiff from the property on grounds that they had been issued with a completion notice. PW1 denied having received the said notice or any other letters alluded to by the Defendant. He noted that the Defendant had put up a church on the said property but it only occupied a small portion and the Plaintiff would be amenable to hiving off the developed portion from the main property once their prayer for specific performance was granted.
5. On cross examination PW1 confirmed that the request for extension of the completion period was made by the Plaintiff in writing and the Defendant allowed it. He stated that there was also a second extension entered into verbally between him and Ms. Nyaga of Kaplan & Stratton Advocates which did not have a timeline, hence it was open ended. He stated that they did not issue a completion notice to the Defendant because they did not want to harass the church. He also stated that the letter from plaintiff's subsequent advocates is dated August 28, 2000.
6. In reference to paragraph 6 on page 2 of his statement where he says that Mr. Wilcox from defendant had allowed them to take over possession of the property, PW1 clarified that there was no evidence of the meeting of 1998 between him and Mr. Wilcox.
7. On the issue of seeking approvals for subdivision prior to the sale completion, PW1 stated that he used the sale agreement and the deposit receipt to seek approvals and the reason why he began the process early into the execution of the agreement was because the process is usually lengthy. He contended that the developments on the suit land were undertaken by the defendant during the subsistence of the suit.
8. DW1 Hesbon Usi introduced himself as the secretary/Trustee of the defendant. He adopted his witness statement dated May 21, 2015 as his evidence in chief and produced the documents in their list dated December 1, 2014 as exhibits 1-12. He also produced photographs of the suit property as exhibit 13. Dw1 avers that defendant is the registered owner of the suit property.
9. That they had indeed entered into a sale agreement of the suit land with the plaintiff in which plaintiff's sought an extension of completion date vide a letter of September 1, 1997. Defendant obliged via their letter of September 17, 1997 in which the extension was for 90 days that is upto October 15,



1997. That in the month of July and August 1998, the defendant obtained the relevant rate clearance certificate and consent from the commissioner of lands and therefore wrote to plaintiff on August 21, 1998 through their advocates requesting them to pay the balance of the purchase price. There was no reply hence defendant wrote another letter dated September 2, 1998 directly to the plaintiffs requesting for payment of the balance. Again there was no response prompting the defendant to issue the completion notice dated September 14, 1998. Again there was no response hence defendant rescinded the sale vide their letter dated October 15, 1998.
10. DW1 further stated that plaintiff has never been in possession of the suit land.
 11. On cross examination, DW1 affirmed that at the time of the agreement, the land was vacant but by 2003 when the suit was filed the buildings on the photographs produced in court had already been constructed, and they include a church, a store house and a generator building.
 12. He noted that Mr. Wilcox was the Centre Manager in charge of Kenya, Uganda and Tanzania who acting on instructions from the head office had the authority to oversee the affairs of the Organization. DW1 was however not aware of the discussion referenced to by PW1 between him and Mr. Wilcox which discussions allegedly allowed the Plaintiff entry into the Church's property.
 13. On the issue of subdivision of the suit land allegedly undertaken by the plaintiff, DW1 stated that plaintiff could not have purported to carry such activities as they were not owners of the suit land. That just because there were Council minutes showing application for approvals does not mean that the approval was granted.
 14. DW2 Mrs. Julia Bahati Nyaga an Advocate of the High Court adopted her witness statement dated December 1, 2014 as her evidence. Her testimony is more or less similar to that of DW1 adding that they tried to contact the Plaintiff severally between 1998 and 2000 without any response.
 15. On cross examination DW2 stated that the letters filed in court were unsigned because they were file copies. She could not confirm whether the letters sent to the Plaintiff by registered post were received because there were no certificates of postage but it is deemed that the Plaintiff received the letters after 4 days. DW2 also confirmed that some letters had different physical address from others. She refuted having received the Plaintiff's letter dated January 14, 1998.
 16. On re-examination, she confirmed that in January 1998 she met the Plaintiff's advocate and confirmed that the purchase was on course but did not hear from the Plaintiffs thereafter.

Submissions

17. It was submitted for the Plaintiff (in their submissions dated December 20, 2021) that despite extension of the completion date to October 15, 1997, the Defendant is the one who was not ready to complete the transaction, thus completion date was extended indefinitely. They deny having received any completion notice and that the Defendant having breached the contract had no right to issue such a completion notice. Thus the rescission of the agreement was not only un-procedural, wrongful and unlawful, but it was never effected because Clause 4(7) of the LSK Conditions of sale was not invoked. It was also submitted that the agreement did not indicate that time was of the essence.
18. It was submitted that an award of damages would not be an equitable remedy because the Defendant's action denied the Plaintiff an opportunity to invest elsewhere, hence the prayer for specific performance was merited. It was further submitted that their claim was not time barred. The Plaintiffs were willing to hive off the part that had been occupied by the Defendant adding that when they entered into the sale agreement, the Defendant became a trustee of the Plaintiff and had no authority to undertake any constructions on the said land. Counsel also submitted that the Plaintiff caused the



- property to be surveyed and sub divided, fenced, repaired the gate, cleared the bushes and also procured site service works and it should be compensated for the loss.
19. The plaintiffs have submitted that they are entitled to costs as defendant is the one who was in breach of the agreement.
 20. In support of their claim, the plaintiffs relied on the following authorities; *Martin Richard Oduor v Republic* (2019)eKLR, *Gurdev Singh Birdi & Another as Trustees of Ramgharia Institute of Mombasa v Abubakar Madhbuti* [1997] eKLR, *Anne Murambi v John Munyao Nyamu & another* [2018] eKLR, *Amina Abdul Kadir Hawa v Rabinder Nath Anand & another* [2012] eKLR, *Rose Wathiru Waruinge v John Njenga Kimani* [2006] eKLR, *Jennifer Syokau Mutie v Grace Mwithi Maundu & another* [2018] eKLR, *Samuel Kanogo Ritbo v John Mwangi Kariithi & Another* (1988) KLR and *Cecilia Karuru Ngayu v Barclays Bank of Kenya & another* [2016] eKLR.
 21. The Defendant's submissions are dated March 1, 2022, where they contend that Plaintiff was in breach of the sale agreement dated June 4, 1997 by failing to pay the balance upon issuance of a completion notice dated September 14, 1998. They stated that Plaintiff was never ready, able and willing to complete the sale. Thus defendant had a right to rescind the contract. It was submitted that Plaintiff's delay between 1998 and 2000 was unreasonable and inexplicable and condemned the argument that time was not of essence.
 22. The defendant therefore submits that Plaintiff is not entitled to any prayer sought including the prayer of damages because the contract was not breached by the Defendant, the damages had not been quantified by evidence and the Plaintiff had no authority to cause subdivision of a property they had no legal title to. In any event the Defendant had utilized the suit property for over 24years and they constructed a church between 2000 and January 2001 which had been operational for over 21 years. As such, the suit should be dismissed with costs to the Defendant.
 23. In support of their arguments, defendant relied on the cases of; *Vipingo Properties Limited v Randolph Tindika; Registrar of Titles (Interested Party)* [2022] eKLR, *Francis Wabiu Theuri vs Monica Njeri* (2012) KLR, *Samuel Ngige Kiarie v Njowamu Construction Company Limited & another* (2019) eKLR, *Amina Abdul Kadir Hawa v Rabinder Nath Anand & another* [2012] KLR, *Nabro Properties Ltd v Sky Structures Ltd & 2 others* (2002) eKLR, *Capital Fish Kenya Limited v Kenya Power & Lighting Company* (2016)eKLR.

Analysis and Determination

24. I have considered the pleadings, the evidence and the rival submissions. The issue falling for determination is ; Whether the agreement for sale dated June 4, 1997is enforceable and whether the plaintiff is entitled to the remedies sought in the further amended plaint.
25. In the case of *Fina Bank Ltd vs. Spares and Industries Ltd*[2000] 1EA 52, Shah JA, stated that :

“..the function of the Court is to enforce what is agreed between the parties and not what the court thinks ought to have been fairly agreed between the parties...”
26. And in *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd and Another* (2002) EA 503, it was held that;

“ A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved” .



27. In the sale agreement dated June 4, 1997 adduced as evidence by both parties, it shows that the completion date was August 31, 1997. However, vide a letter dated September 1, 1997 also adduced by both parties as evidence, the Plaintiff sought extension of the completion date which was extended to October 15, 1997. But there was no further written document relating to extension.

28. The Court of Appeal in *Housing Company of East Africa Limited v Board of Trustees National Social Security Fund & 2 others* [2018] eKLR held:

“Accordingly, the appellant’s arguments founded on Clause 4(7) of the Law Society Conditions are wholly misplaced as the appellant cannot on the one hand assert that the sale agreement dated October 9, 2004 did not have a special condition expressly stating that time was of the essence, while at the same time recognizing that time had in fact been made of the essence through mutually agreed extensions of the original completion date and from which it benefited.

Time had clearly been made of the essence in respect of the completion date of September 30, 2007, as a result of the appellant’s own request for a final extension of 60 days and granted as per the letter of August 2, 2007. This is clear from the 1st respondent’s preceding letter dated July 9, 2007”.

29. These findings and the facts of this case settles the issue of whether time was of the essence or not. After completion time was extended to 15th October by the Defendant on the Plaintiff’s request, this court notes that there is no further clear communication regarding extension of the completion date. The Plaintiff denies receiving the letters written by the Defendant in year 1998 including the notice of completion. The Defendant denies having received the letter from the plaintiff dated January 14, 1998. Both PW1 and DW2 do admit having held some meeting in January of 1998. They are both advocates, yet they did not deem it fit to reduce whatever they discussed into writing. Thus the content of their discussion is neither here nor there.

30. I again make reference to the case of *Housing Company of East Africa Limited v Board of Trustees National Social Security Fund & 2 others* [2018] eKLR (*supra*) where the Court further held:

“The extension period came and went without the appellant meeting its undertaking such that by September 30, 2007 the purchase price had not been fully paid. Indeed the outstanding balance was Kshs. 37,250,2502-. In terms of clause 10 of the agreement, the 1st respondent was on that ground entitled to repudiate and or rescind the agreement on the basis that the appellant had breached the agreement... As correctly observed by the judge, where a purchaser has dragged his feet and has been guilty of unnecessary delay as was the case here, the vendor was perfectly entitled to serve upon the purchaser a notice limiting time, at the expiry of which the vendor would treat the sale agreement as rescinded”.

31. The plaintiff has not indicated the course of action they undertook to streamline the contract after the expiry of the completion date on October 15, 1997. The contents of clause 14.2 of the sale agreement stipulate that;

“If any term or condition of this agreement shall to any extent be found or held to be invalid or unenforceable, the parties shall negotiate in good faith to amend such term or condition so as to be valid and enforceable”.



32. I believe the above clause is the one which gave the parties an opportunity to re-negotiate and this appears to have been taken upon by the parties after the expiry of the first deadline on August 31, 1997. The failure to invoke this clause after the second deadline of October 15, 1997 left the parties in a vulnerable position as the contract was no longer binding. As stated by the defendant, it was no longer viable to let the transaction drift indefinitely. To this end, I find that the logical course of action was rescission, hence defendant was perfectly in order to bring the impasse to an end. There was however no justification to retain the deposit of Ksh 500 000 as the agreement did not make provision for forfeiture of the same.
33. The justification advanced by the plaintiff that as serious purchasers, they went ahead to subdivide the property is baseless since their rights and interests in the suit land had neither been ascertained nor crystallized. Further, there was no provision in the sale agreement as to when plaintiffs were to take possession. Their claim that they were allowed to take possession of the land by Mr Wilcox of the defendant was not reduced into writing and has in any event been denied.
34. On the issue of the remedy of Specific Performance, it is trite as held in the Court of Appeal in *Mangi v Munyiri & Another* [1991] eKLR that;
- “...It is well established law that a claim for specific performance is not granted as a matter of course. Being an equitable remedy, the Court has to consider all the circumstances including the conduct of the parties and whether in all the circumstances an applicant is entitled to equitable relief...”
35. In the final analysis, I find that both parties did not abide to their contractual obligations. I therefore proceed to give the following orders; The plaintiffs claim is hereby dismissed save that the defendant is directed to reimburse the Plaintiff the deposit of Kshs. 500,000 within 30 days failure to which the amount shall attract interests at courts rate as from the 30 day from date of delivery of this Judgment. Each party is to bear their own costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF MAY, 2022 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

M/S Ndinda holding brief for Ithandeka for the Plaintiff

Oyoo holding brief for Mumo for Defendant

Court Assistant: June Nafula

