



**Obusuru v Mwai & 4 others (All trading as Karima Housing Company) & another
(Environment & Land Case 207 of 2016) [2022] KEELC 2821 (KLR) (30 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 2821 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 207 OF 2016**

**OA ANGOTE, J
JUNE 30, 2022**

BETWEEN

ROBERT R. E. OBUSURU PLAINTIFF

AND

**KARUMA MWAI, WAIRU KARIUKI, MURAGE WOKABI, MAWNGI
NGORORO & GACHURIRI NGERECHA (ALL TRADING AS KARIMA
HOUSING COMPANY) 1ST DEFENDANT**

JOHN NG'ANG'A KIARIE 2ND DEFENDANT

JUDGMENT

1. Vide an Amended Complaint dated 7th March, 2007, the Plaintiff instituted this suit against the Defendants seeking for the following reliefs;
 - a. Vacant possession of LR No 209/4401/224 Nairobi, upon payment of the balance of the purchase price of Kshs 178,000.
 - b. In the alternative, the Defendants do jointly refund the amount of Kshs 752,000 plus interest rate of 18% from 5th July, 2005 until payment in full.
 - c. Costs of this suit.
2. It is the Plaintiff's case that he was at all material times the legal owner of all that property known as LR 209/4401/224 (hereinafter the suit property); that on or about August, 2003, he entered into a Sale Agreement with the 1st Defendant whereby the 1st Defendant agreed to sell and the Plaintiff agreed to buy the suit property and that at the time of the sale aforesaid, the 1st Defendant alleged that the original Title had been misplaced hence there was need to apply for a Provisional Title.
3. It was deposed by the Plaintiff that the process of obtaining the Provisional Title prolonged the sale; that he duly paid the purchase price of Kshs 752,000 leaving a balance of Kshs 178,000 as agreed and



that sometime in 2005, the 1st Defendant's counsel, at the Plaintiff's request, issued a notice to the tenants in occupation of the suit property before the last installment could be paid as the tenants had not paid rent for a long time.

4. The Plaintiff averred that rather than communicating on the progress of the tenants vacating the suit property, the 1st Defendant's advocates on 5th July, 2005 served him with a notice of rescission of contract while undertaking to refund him the purchase price paid being Kshs 752,000, which sum has yet to be paid to date. According to the Plaintiff, sometimes in 2006, it came to his attention that there was construction being undertaken on the suit property by the 2nd Defendant and that despite informing the 2nd Defendant that he was the owner of the suit property, the 2nd Defendant has refused and /or neglected to cease construction.
5. The Defendants filed a joint Statement of Defence denying the aversons in the Plaint and stating that contrary to the Plaintiff's allegations, he was well aware of the loss of the Title prior to the execution of the sale agreement; that the Plaintiff breached the sale agreement by failing to complete the purchase price and that giving of vacant possession was not a condition precedent to the payment of the purchase price.
6. It was averred by the Defendants in the Defence that the Plaintiff has been informed that he will receive a refund of the purchase price once he cancels the transfer which is in his name; that the Plaintiff is in possession of the title to the suit property; that the Plaintiff has no basis seeking for vacant possession on account of an agreement that has already been rescinded and that the Plaintiff is not entitled to any interest on the purchase price. According to the Defendants, the Plaintiff prematurely filed this suit before exhausting the Arbitral procedures as per the sale agreement.
7. Despite the joint Defence, the 2nd Defendant retained his counsel and filed a Defence and Counterclaim in which he averred that he is the rightful owner of the suit property having purchased the same on 4th July, 2004 for the sum of Kshs 1,200,000 after which he took vacant possession. In the counterclaim, the 2nd Defendant has sought for the dismissal of the Plaintiff's suit with costs and an order declaring him as the rightful owner of LR 209/4401/224

Hearing & evidence

8. The Plaintiff, PW1, informed the court that he entered into a sale agreement with the 1st Defendant for the suit property; that after the purchase, the 1st Defendant informed him that the original title document was lost and there was need to apply for a provisional title and that he duly paid the purchase price leaving a balance of Kshs 178,000 which was to be paid once the tenants had vacated the premises.
9. PW1 informed the court that rather than informing him that the tenants had vacated, the 1st Defendant's advocate issued to his Advocate a rescission notice promising to refund all the monies paid, which monies have never been paid to date and that the 2nd Defendant has been developing the suit property.
10. On cross-examination, PW1 stated that it was a condition of the sale agreement that the balance of the purchase price would be paid after being issued with the Provisional Certificate of Title; that he is aware of the letter dated 5th June, 2005 sent to him cancelling the sale agreement; that his Advocate authored the letter of 23rd August, 2005 stating that they were amenable to a refund of the paid purchase price and that he is aware that the 2nd Defendant entered into an agreement with the 1st Defendant and took possession of the suit property.
11. On re-examination, PW1 stated that the agreement the 1st Defendant had with the 2nd Defendant is dated 4th July, 2005 while the letter rescinding the Agreement came a day later on 5th July, 2005; that



there was no notice to rescind the contract; that the Provisional Title is dated 14th November, 2004 and that the land was registered in his name on 24th December, 2004.

12. PW1 informed the court that by the time the Defendants entered into the agreement for the suit property, the land had already been transferred to him; that he did not consent to the sale of the property to the 2nd Defendant and that he was to pay the balance of the purchase price after the tenants had moved out of the premises.
13. PW1 finally testified that he deposited the balance of the purchase price in court; that in its Ruling, the court found that the letter of rescission came after the sale agreement had been entered into between the Defendants and that vide the letter dated 3rd August, 2005, he indicated that he was waiting for the tenants to vacate the suit property before paying the balance of the purchase price.
14. DW1, the 2nd Defendant, stated that he purchased the suit property from the 1st Defendants for the sum of Kshs 1,200,000; that he has enjoyed quiet possession of the suit property since he purchased it in 2005; that he bought the property in good faith without knowledge of any claim by the Plaintiff or any other party and that he was informed that the 1st Plaintiff had not finished paying for the land.
15. On cross-examination, DW1 stated that the agreement for sale is dated 4th July, 2005; that there was a letter by the Plaintiff's counsel dated 23rd August, 2005 indicating that he was willing to accept the balance of the purchase price; that he was informed that the suit property was vacant and that he could not remember conducting a search before purchasing the suit property.

Submissions

16. The Plaintiff, through his counsel, submitted that the delay in the completion of the sale agreement dated 13th November, 2003 between the Plaintiff and the 1st Defendant was caused by the 1st Defendant's willful concealment of material information on the issue of the lost title and the fact that the tenants on the suit properties were in rental arrears of over Kshs 3,000,000.
17. Counsel submitted that after being informed of the foregoing, the Plaintiff made a further agreement with the 1st Defendant that he would pay the balance of the purchase price upon delivery of vacant possession; that rather than deliver vacant possession, the 1st Defendant purported to rescind the contract and pledged to refund the purchase price which it failed to do and that the contract was never formally rescinded and the balance of Kshs 178,000/= was deposited into the court.
18. Counsel submitted that following his registration as the owner of the suit property on 24th December, 2004, the Plaintiff has been paying all the land rates and rents; that Section 26 of the [Land Registration Act](#) provides for sanctity of title and that title having passed to him, the 1st Defendant did not have title to pass to the 2nd Defendant. Reliance was placed on the case of Daniel Kiprugut Maiywa vs Rebecca Chepkurgat Maina [2019]eKLR.
19. The 2nd Defendant through his counsel, submitted that the Plaintiff is not entitled to the suit property having admitted that he did not pay the balance of the purchase price and that it was only seven years after execution of the suit property that the Plaintiff deposited the balance of the purchase price in court.
20. The 2nd Defendant placed reliance on the case of Abdelhafid Tchoketch & another vs Mercy Nyambura Kanyara [2021] eKLR and Benard Nganga Ndirangu vs Samuel Wainaina [2019] eKLR which set out that the jurisdiction for the grant of an order of specific performance.
21. It was submitted that specific performance will not be granted if there is an effective alternative remedy; that having sought for a refund, it is apparent that there is an alternative remedy open to the Plaintiff



and that further, any order for specific performance will affect the status of the 2nd Defendant who was not a party to the contract between the Plaintiff and the 1st Defendant.

Analysis & Determination

22. Having carefully considered the pleadings, the evidence and submissions by the parties herein, the following arise as the issues for determination;
 - i. Whether there was a breach of the Sale Agreement of 13th November, 2003 between the Plaintiff and the 1st Defendant and if so?
 - ii. Whether the sale agreement was validly rescinded?
 - iii. Whether the parties are entitled to the orders sought in the Plaint and counterclaim?
23. The Plaintiff instituted this suit seeking for vacant possession of the suit property upon payment of the balance of the purchase price of Kshs 178,000, and in the alternative, for the 1st Defendant to refund him the sum of Kshs 752,000 plus interest at the rate of 18% from 5th July, 2005 until payment in full.
24. The Plaintiffs case is that he purchased the suit property and obtained a title thereto; that he paid the sum of Kshs 752,000 leaving a balance of the Kshs 178,000 and that he agreed with the 1st Defendant that he was to pay the balance of the purchase price upon being given vacant possession of the suit property.
25. According to the Plaintiff, instead of the 1st Defendant giving him vacant possession, the 1st Defendant purported to rescind the contract and promised to refund the purchase price; that the 1st Defendant has to date not refunded the purchase price and that the 1st Defendant sold the suit property to the 2nd Defendant who took possession of the same and began developing the land.
26. The Plaintiff adduced in evidence the sale agreement dated 13th November, 2003, copies of receipts and cheques amounting to Kshs 752,000 and Gazette Notices dated 16th April, 2004 and 11th June, 2004 by the Registrar of Titles indicating that due to the loss of the Certificate of Title issued to the 1st Defendant, the Registrar would after 14 days dispense with its production and register the instrument of transfer on behalf of the Plaintiff after issuing a Provisional Certificate of Title.
27. Despite filing his Defence and documents, the 1st Defendant did not participate in the trial. The 2nd Defendant on his part asserts that he is the legitimate proprietor of the suit property having purchased the same from the 1st Defendant. The 2nd Defendant adduced in evidence the sale agreement dated 4th July, 2005 between himself and the 1st Defendant, a letter by the Plaintiff's counsel dated 23rd August, 2005 indicating that the Plaintiff was amenable to receiving a refund of the purchase price and a letter dated 12th February, 2009 from the 1st Defendant's Advocate seeking directions on the payment of the refund.
28. It is undisputed that the Plaintiff and the 1st Defendant entered into an agreement for the sale of the suit property. What is in issue is whether there was a breach of the agreement by the Plaintiff which entitled the 1st Defendant to rescind the agreement and thereafter sell the suit property to the 2nd Defendant.
29. Blacks Law Dictionary 8th edition, defines breach of contract as:-

“Violation of a contractual obligation by failing to perform one's own promise, by repudiating it, or by interfering with another party's performance. A breach may be one by non-performance, or by repudiation, or both. Every breach gives rise to a claim for damages, and may give rise to other remedies. Even if the injured party sustains no pecuniary loss



or is unable to show such loss with sufficient certainty, he has at least a claim for nominal damages. If a court chooses to ignore a trifling departure, there is no breach and no claim arises.”

30. The manner in which a written document, whether an agreement, contract and/or deed is to be interpreted, has been the subject of several decisions. It is now accepted that written contracts being self-contained can only be construed and interpreted on the basis of the contents therein, and no oral evidence is admissible to contradict, vary or alter the terms of such an instrument. This was expressed by the Court of Appeal in *Fidelity Commercial Bank Limited vs Kenya Grange Vehicle Industries Limited* [2017] eKLR as follows:

“This is what sometimes is called the principle of four corners of an instrument, which insists that a document’s meaning should be derived from the document itself, without reference to anything outside of the document (extrinsic evidence), such as the circumstances surrounding its writing or the history of the party or parties signing it....

The supporting rationale for this rule is that, since the contracting parties have reduced their agreement to a single and final writing, extrinsic evidence of past agreements or terms should not be considered when interpreting that written contract agreement, as the parties had consciously decided to ultimately leave them out of the contract. In other words, one may not use evidence made prior to the written contract to contradict the ultimate contract that has been reduced into writing.”

31. The dispute herein turns on the terms of the agreement with respect to the payment of the purchase price. Clause 1 of the sale agreement between the Plaintiff and the 1st Defendant laid out the manner of payment of the purchase price. The sale agreement provided that the purchase price is Kshs 930,000.
32. Kshs 93,000 was to be paid during execution of the Agreement while Kshs 637,000 was to be paid upon registration of the Transfer in the Purchaser/Plaintiff’s name, and Kshs 200,000 upon the Vendors/1st Defendant’s Advocate availing the provisional Certificate of Title to the purchaser.
33. It was a further term of the agreement that the original Certificate of Title would be delivered upon execution of the sale agreement; that the Vendor would clear rates, electricity and water bill and procure all necessary documents to enable registration of the transfer and that upon payment of the purchase price, the Vendor would execute and deliver a duly executed transfer form and deliver possession of the property to the purchaser upon successful registration of the transfer.
34. Whereas the 1st Defendant caused the suit property to be transferred to the Plaintiff as evinced in the Provisional Certificate of Title, the Plaintiff admits that he did not pay the balance of the purchase price. According to him, the balance of the purchase price of Kshs 178,000 was to be paid once the tenants had vacated the suit property.
35. A perusal of the sale agreement leaves no doubt that there was no such requirement. Pursuant to clause 4 and 5 of the sale agreement, the grant of possession of the suit property to the Plaintiff was upon payment of the purchase price and thereafter the successful registration of the transfer. Any oral agreement varying the payment terms would be a nullity. That is the position that was taken by the Court of Appeal in the case of *Peter Mujunga Gathuru vs Harun Osoro Nyambuki & another* [2015] eKLR where it was held as follows:

“As stated earlier on in this judgment, that clause was never modified or varied subsequently in writing. The claim that there was an oral agreement varying this amount later flies in



the face of Sections 97 and 98 of the Evidence Act which for ease of reference provide as hereunder: -

Section 97(1) of the Evidence Act Cap 80 Laws of Kenya

“when the terms of a contract, or a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under provisions of this Act.”

Further, Section 98 of the Act provides;

“When the terms of any contract or grants or other disposition of property, or any matter required by law to be reduced to the form of a document have been proved according to Section 97, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to or subtracting from its terms.”

The alleged oral agreement does not fall within the provisos under Section 98 and is outrightly disallowed under Proviso (iv) of the said provision which provides:-

“The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force...”

In this case, the oral agreement was never proved. Secondly, pursuant to Section 3(3) of the Law of Contract Act, the agreement for sale of land is required to be in writing.”

36. In view of the foregoing, and taking into account the fact that the terms of the sale agreement did not provide that the payment of the balance of the purchase price was dependent on the delivery of vacant possession of the suit property to the Plaintiff, the court is unable to find any breach on the part of the 1st Defendant. Indeed, it is the Plaintiff who was in breach of the terms of the Agreement with respect to the payment of the purchase price.
37. Vide a letter dated 5th July, 2005, the 1st Defendant wrote a notice to the Plaintiff informing him that he has rescinded the sale agreement of 13th November, 2003. The Plaintiff disputes the validity of this rescission.
38. The law on rescission of a contract for sale of land is to the effect that if the contract contains a condition entitling the Vendor to rescind on the happening of certain events, and those events happen, then the Vendor may rescind. Save for the conditions aforementioned, the Vendor may rescind an agreement if the purchaser's conduct is such as to amount to a repudiation of the contract, whereafter the parties can be restored to their former positions.
39. The sale agreement between the Plaintiff and the 1st Defendant did not provide for rescission of the agreement. However, clause 10 thereof provided that the Law Society Conditions of Sale (1989 Edition) would apply, so far as they were not inconsistent with the conditions contained under the sale Agreement.



40. The Law Society Conditions of Sale (1989 Edition) provide for rescission under Condition 11 as follows:

“Rescission

- i. Where a purchaser makes an objection or a requisition under Condition 10 with which the vendor is unable to comply or with which he is unwilling to comply on reasonable grounds of difficulty, delay or unreasonable expense, the vendor may give to the purchaser written notice referring to this Conditions, specifying his grounds and requesting withdrawal of the objection or requisition within a specified period being not less than seven (7) days.
- ii. If the purchaser fails to withdraw the objection or requisition within the period specified by the notice, the vendor may by notice in writing to the purchaser rescind the contract.
- iii. On rescission the vendor shall repay to the purchaser his deposit and any payment of purchase price without interest and the purchaser shall return to the vendor all papers belonging to the vendor.
- iv. The purchaser has no claim against the vendor for costs, compensation or otherwise.
- v. Where the contract becomes void under any law the provisions of sub-conditions (3) and (4) apply.”

41. Under Clause 4(7) of the Law Society of Kenya Conditions of Sale, a vendor who is ready, able and willing to complete the sale and is aggrieved by the purchaser’s default to complete the contract within the completion period is required to issue a twenty-one days’ notice requiring the purchaser to complete the contract. Clause 4(7) provides thus.

“4(7) This sub-condition applies unless a special condition provides that time is of the essence in respect of the completion date:

- a. In this condition “completion notice” means a notice served in accordance with this sub-condition;
- b. If the sale shall not be completed on the completion date, either party (being then himself ready, able and willing to complete) may after that date serve on the other party notice to complete the transaction in accordance with this sub-condition. A party shall be deemed to be ready, able and willing to complete:
 - i. If he could be so but for some default or omission of the other party;
 - ii. Notwithstanding that any mortgage on the property is unredeemed when the completion notice is served, if the aggregate of all sums necessary to redeem all such mortgages (to the extent that they relate to the property) does not exceed the sum payable on completion.
- c. Upon service of the completion notice it shall become a term of the contract that the transaction shall be completed within twenty-one (21) days of service and, in respect of such period, time shall be of the essence of the contract.



- d. If the purchaser does not comply with a completion notice:
 - i. The purchaser shall forthwith return all documents delivered to him by the vendor and at his own expense procure the cancellation of any entry relating to the contract in any register;
 - ii. Without prejudice to any other rights or remedies available to him, the vendor may forfeit and retain any deposit paid and/or resell the property by auction, tender or private treaty.
- e. If on any such re-sale contracted within six (6) months after the completion date the vendor incurs a loss, the purchaser shall pay to the vendor liquidated damages. The amount payable shall be the aggregate of such loss, all costs and expenses reasonably incurred in any such re-sale and any attempted re-sale and interest at the contract rate on such part of the purchase money as is from time to time outstanding (giving credit for the amount of the forfeited deposit (if any) and for all sums received under any re-sale contract on account of the re-sale price) after the completion date;
- f. If the vendor does not comply with a completion notice, the purchaser, without prejudice to any other rights or remedies available to him, may give notice to the vendor forthwith to pay to the purchaser any sums paid by way of deposit or otherwise under the contract and interest on such sums at the contract rate from four (4) working days after service of the notice until payment. On compliance with such notice, the purchaser shall not be entitled to specific performance of the contract but shall forthwith return all documents delivered to him by the vendor and, at the expense of the vendor, procure the cancellation of any entry relating to the contract in any register;
- g. Where, after service of a completion notice, the time for completion shall have been extended by agreement or implication, either party may again invoke the provisions of this condition which shall then take effect with the substitution of “ten (10) days” for “twenty-one (21) days” in paragraph (c) of this sub-condition.”

- 42. Vide its letter dated 5th July, 2005, the 1st Defendant’s advocate informed the Plaintiff that he had rescinded the contract. The LSK Conditions of Sale are clear that a completion notice must be issued prior to a rescission notice. The completion notice not having been issued, it is the finding of this court that the rescission notice was prematurely issued. The sale agreement between the Plaintiff and the 1st Defendant was therefore not validly rescinded.
- 43. The Plaintiff has sought for vacant possession of the suit property as the principal relief and in the alternative a prayer for the refund of the purchase price. In light of the finding that the 1st Defendant did not validly rescind the contract between itself and the Plaintiff, it follows that the 1st Defendant could not validly have entered into an agreement of sale relating to the suit property.
- 44. The Plaintiff’s prayer for vacant possession upon payment of payment of the balance of the purchase price is essentially a claim for specific performance. It is common ground that the relief of specific



performance, being an equitable relief is dependent on the circumstances of each case. In the case of *Reliable Electrical Engineers Ltd vs Mantrac Kenya Limited* (2006) eKLR, the court held as follows:

“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 an adequate remedy specific performance may still be refused on the ground of undue influenced or where it will cause severe hardship to the defendant.”

45. A party seeking the relief of specific performance must show that he performed and/or he is willing to perform his part of the bargain under the Agreement. This was aptly stated by the Court of Appeal in *Gurdev Singh Birdi & Narinder Singh Ghatora as Trustees of Ramgharia Institute of Mombasa v Abubakar Madhubuti* [1997] eKLR as follows:

“When the appellants sought the relief of specific Performance of the respondent’s property...they must have been prepared to demonstrate that they had performed or were ready and willing to perform all the terms of the agreement...which ought to have been performed by them and indeed that they had not acted in contravention of the essential terms of the agreement...”

46. According to the Plaintiff, he has deposited the balance of the purchase price in court pursuant to a consent entered into on 5th October, 2009, which consent binds the Defendants and as such he is entitled to the orders sought.

47. The court has perused the consent order. Whereas indeed the Plaintiff was to deposit the balance of the purchase price in court, the nature of the consent did not determine the rights of the parties with respect to the suit property.

48. The consent order was entered into seven years after the contract. There is no evidence to show that the Plaintiff performed his part of the contract or was willing to do so before the consent. That being the case, the court is not convinced that the Plaintiff is entitled to the equitable relief of specific performance.

49. As to the alternative remedy for a refund, the court finds that the Kshs 752,000 paid towards the purchase price has not been refunded. However, even while seeking a refund, the Plaintiff does not deny that the title to the suit property is in his names. That being the case, it would be unconscionable for the Plaintiff to continue holding on the title and receive a refund of the purchase price at the same.

50. In conclusion, the Plaintiff’s claim partly succeeds as follows.

- a. The 1st Defendant be and is ordered to refund the purchase price of Kshs 752,000 within 60 days from the date of this judgment together with interest from the date of filing this suit until payment in full.
- b. On receipt of the refund aforesaid, the Plaintiff shall execute all the documents necessary to effect a transfer of the suit property to the 1st Defendant.
- c. Each party shall bear their own costs.



DATED, SIGNED AND DELIVERED IN NAIROBI VIRTUALLY THIS 30TH DAY OF JUNE, 2022.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Aketch for the Plaintiff

Mr. Karoki for the 2nd Defendant

Court Assistant – June/Tracy

