



**Mulela v Fort Properties Limited (Environment & Land Case
162 of 2015) [2022] KEELC 3774 (KLR) (28 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 3774 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 162 OF 2015**

NA MATHEKA, J

JUNE 28, 2022

BETWEEN

ROISE EMMA MULELA PLAINTIFF

AND

FORT PROPERTIES LIMITED DEFENDANT

JUDGMENT

1 The Plaintiff states that at all material times up to 6th February 2012, the Defendant was the registered owner of plot of land known as Subdivision number 8604 (Original number 1872/328) together with all the improvements thereon standing hereof referred to as “Suit property”. That on the 7th day of February 2012, the Plaintiff and her husband now deceased entered into an agreement for sale of the property wherein the Plaintiff and her late husband were the purchasers and the Defendant was the vendor at the agreed consideration of Ksh.2,600,000/=. The Plaintiff states that they paid the vendor the whole amount but it has despite several demands failed to effect the transfer and give the Plaintiff the title deed in their names. That the Defendant has now turned around and started claiming for stamp duty and other payments contrary to the agreement entered into by the parties and has refused to effect the transfer through it is advocates. That as a result, the Plaintiff is suffering loss and damages since she cannot develop and or deal with the plot in the manner she desires and is thus suffering economical losses. The Plaintiff prays for judgment against the Defendant for:-

- a. A declaration that the purchase price included all other payments payable by the purchasers with regard to plot No.8604 (Original number 1872/328).
- b. An order that the Defendant does transfer the property subject matter hereof and give to the Plaintiff a title deed as per the agreement.
- c. Costs of this suit with interest at courts rate.
- d. Any other relief this Honourable court may deem fit and just to grant



2 The Defendant states in their statement of defence that it was an agreed term that the property would be sold at the discounted price of Kshs.2,600,000.00 from Kshs.3,000,000.00 provided that the purchaser (Plaintiff herein) do make the cash payment in seven (7) days of the date of the agreement. That the payments were received by the Defendant from the Plaintiffs' Advocates i.e. Messrs Omondi Waweru & Company Advocates, on the 5th and 10th of July 2012 and 2nd August 2012 of Kshs. 1,000,000.00, Kshs.600,000.00 and Kshs. 1,000,000.00 respectively. The Defendant states that it was a term of agreement and specifically clause number 6 that the completion shall be the 7th day from the date of the Sale Agreement. Defendant states that the failure of the Plaintiff to pay the purchase price within seven (7) days rendered the Sale Agreement null and void. The Defendant states that negotiations commenced afresh between the Plaintiff and the Plaintiff's advocates who then instructed us that the Plaintiff was willing to continue with the Sale Agreement. On the Defendant's part and in light of the breached agreement, they agreed to continue with the agreement dated 7th February 2012 save that the costs and disbursements of the transaction be absorbed by the purchaser (Plaintiff). The Defendant states that it received a confirmation of that agreement on the 21st June 2012 from the Purchaser's advocates and that the purchaser would pay the advocates costs, stamp duty and disbursement fees in relation to the property. Pursuant to the above and on the 2nd July 2012, the Defendant executed the completion documents and forwarded the same to the Plaintiffs advocates, thereafter awaiting to receive its payments. The Defendant states that it is the purchaser's (Plaintiff's) advocates who are demanding for Kshs. 137,680.00 made up of stamp duty, registration fees, valuation fees and legal fees with V.A.T from the purchaser (Plaintiff) directly. The Defendant prays that the matter be dismissed with costs.

3 This court has considered the pleadings, evidence and submissions in this matter. The issue for determination before this court then is whether the Plaintiff is entitled to the Order of Specific Performance as sought. Before this court determines whether it should award the order of specific performance, it must first satisfy itself that 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 she entered into a sale agreement with the Defendant for the purchase of the suit property. Further that the same was reduced into writing and signed by all the parties. 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.

4 The court has carefully perused the sale agreement produced as PExhibit 1 by the Plaintiff and find that the same is in writing and is signed by the parties. It thus met the requirements of section 3(3) of the Contract Act. Further the agreement for sale contains the names of the parties, the description of the property, the purchase price and the conditions thereto. I find that the same is a valid sale agreement



which is enforceable by the parties. In the case of *Nelson Kivuvani vs Yuda Komora & another*, Nairobi HCCC No.956 of 1991, 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”.

5 Granting of specific Performance is discretionary and as such the court should in deciding whether or not to grant the orders look at the merits of the case. The sale agreement having met all the requirements between the Plaintiff and the defendant and therefore the sale agreement between the two is valid and it thus met the requirements of section 3(3) of Contract Act. The court must now interrogate whether there was breach of the said Contract. *Blacks Law Dictionary, 9th Edition, page 213* defines a breach of Contract as;

“a violation of a contractual obligation by failing to perform one’s own promised, by repudiating, or by interfering with another parties 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 unable to show such loss with sufficient certainty he has at least a claim for nominal damages”.

6 I have carefully perused the sale agreement PExhibit 1 which show that on the 7th day of February 2012, the plaintiff and her husband now deceased entered into an agreement for sale of the property wherein the plaintiff and her late husband were the purchasers and the defendant was the vendor at the agreed consideration of Ksh.2,600,000/= . It states inter alia that after completion of the purchase price the vendor’s advocates was to deliver to the purchasers advocates the following:- as per clause 7 of the sale agreement.

- a. Original certificate of title
- b. A duly executed transfer for the property in favour of the purchasers.
- c. A valid rates clearance certificate from the municipal council of Mombasa and
- d. A duly completed valuation form for stamp duty purposes

7 Clause 4 under the special conditions of the agreement of sale provided that the purchase price was inclusive of the advocate’s fees, stamp duty and the registration fees. DW1 testified that the Defendant executed the completion documents and forwarded the same to the Plaintiffs advocates, thereafter awaiting to receive its payments. The Defendant states that it is the purchaser’s (Plaintiffs) advocates who are demanding for Kshs. 137,680.00 made up of stamp duty, registration fees, valuation fees and legal fees with V.A.T from the purchaser (plaintiff) directly. I find that Clause 4 under the special conditions of the agreement of sale provided that the purchase price was inclusive of the advocate’s fees, stamp duty and the registration fees. In the case of *Reliable Electrical Engineers Ltd* 2006 eKLR the Court held that;

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

8 From the above findings and authorities cited I find that the Plaintiff has proved her case on a balance of probabilities and I grant the following orders;

1. A declaration that the purchase price included all other payments payable by the purchasers with regard to plot No.8604 (Original number 1872/328).
2. An order that the defendant does transfer the property subject matter hereof and give to the plaintiff a title deed asper the agreement.
3. Costs of this suit to be paid by the Defendant.

9 It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 28TH DAY OF JUNE 2022.

N.A. MATHEKA

JUDGE

