



Gachura (Being a Legal Representative of the Estate of Godfrey Mbuuri Gachura) v Muga Developers Limited & another (Environment & Land Case 619 of 2016) [2022] KEELC 3153 (KLR) (23 June 2022) (Judgment)

Neutral citation: [2022] KEELC 3153 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 619 OF 2016**

**OA ANGOTE, J
JUNE 23, 2022**

BETWEEN

**ANNE WAITHIRA GACHURA PLAINTIFF
BEING A LEGAL REPRESENTATIVE OF THE ESTATE OF GODFREY MBUURI
GACHURA**

AND

**MUGA DEVELOPERS LIMITED 1ST DEFENDANT
SURAYA PROPERTY GROUP LIMITED 2ND DEFENDANT**

JUDGMENT

Background

1. Vide the amended plaint dated September 7, 2017, the plaintiff seeks the following orders as against the 1st defendant;
 - a. A declaration that the plaintiff is the bonafide purchaser of villas number SPG/03/P3/HO83 and SPG/03/P3/HO90 of Hibiscus Court 4 Villas erected on L.R No 28223/33 (Fourways Junction), Nairobi.
 - b. A permanent injunction restraining the 1st defendant, its agents and/or servants from selling, disposing off and/or transferring Villas Number SPG/03/P3/HO83 and SPG/O33/P3/HO90 of Hibiscus Court 4 Villas erected on L.R No 28223/33 (Fourways Junction), Nairobi to third parties.
 - c. Special damages of Kshs 5,760,000/ = as at 1st September, 2017.



- d. An order of specific performance compelling the 1st defendant to execute a transfer in favour of the plaintiff and to grant vacant possession of Villas Number SPG/03/P3/H083 and SPG/03/P3/H090 of Hibiscus Court 4 Villas erected on L.R No 28223/33(Fourways Junction) Nairobi, to the Plaintiff.
 - e. And or in the alternative, an order that in default by the 1st defendant to execute the transfer, the deputy registrar of this court to execute the said transfer in favour of the plaintiff.
 - f. Interest on (c) above at court rates.
 - g. Costs of the suit.
2. It is the plaintiffs' case that at all material times, the 1st defendant was the registered proprietor of L.R No 28223/33 measuring forty decimal seven three (40.73) hectares having been issued with a grant I.R No 126634/1 and was the owner of Hibiscus Court 4 Villas erected on the aforesaid parcel.
 3. The plaintiff averred in the plaint that on or about 21st september, 2015, the plaintiff and the 1st defendant entered into two agreements for the sale of Villas No: SPG/03/P3/HO83 and SPG/03/P3/HO90 erected on L.R 28223/33 (hereinafter the suit premises) together with two ordinary shares in Hibiscus Court Five for a consideration of Kenya Shillings Twenty-Three Million Five Hundred Thousand (Kshs 23,500,000/=).
 4. It was averred that the total sum purchase price for the two houses was Kshs 47,000,000; that the plaintiff fully paid the purchase price which fact has been acknowledged by the 1st defendant in clause 3 page 3 of the sale agreements and that despite the lapse of the completion date, the 1st Defendant has declined to transfer the suit properties and/or grant the Plaintiff access and/or possession of the suit properties.
 5. Vide an amended defence filed on October 4, 2017, the Defendants, while admitting to the existence of the Sale Agreement of September 21, 2015, averred that the same was founded on an earlier agreement between the Plaintiff and the 1st Defendants' sister company, the 2nd Defendant herein, dated 25th July, 2013 in which the Plaintiff being the owner of L.R No 28223/37 and L.R No 28223/62 had approached the 2nd Defendant with a proposal to sell his parcels of land aforesaid in exchange for the suit property.
 6. The defendants averred that the plaintiff has never made any payment in the form of cash towards the purchase of the villas in issue nor has he transferred his plots aforesaid as consideration to the defendants and that the plaintiff cannot claim what he doesn't own.

Hearing & Evidence

7. The matter proceeded for hearing on October 5, 2021. The plaintiff, as PW1, testified that she is the wife of Godfrey Mburu Gachura (deceased); that the claim herein is in respect of two houses; that her husband build two plots in Jacaranda and that pursuant to the Agreement dated July 25, 2013, they agreed to sell plots numbers 62 and 63 to Suraya in exchange of two houses.
8. PW1 testified that her husband was given House No. 47 and 48 at the cost of Kshs 23,500,000/= each; that it was agreed that Suraya would meet all the costs including Stamp duty and transfer fees; that the 1st and 2nd Defendants' later offered House No. 83 and 90 in place of house no 47 and 48 and an agreement to that effect was signed and that after completion of the houses, the same were never transferred to the deceased.



9. PW1 stated that no payment was due from her husband for the two houses; that the Agreement was for compensation of the plots taken from them; that despite the houses being completed in 2015, the Plaintiff has not been granted possession thereof and that the Plaintiff has lost rental income hence the claim for special damages.
10. The defendants did not participate in the hearing despite having been served with a hearing notice.

Submissions

11. The plaintiff filed submissions on January 25, 2022 wherein counsel submitted that the deceased entered into an agreement with the 2nd Defendant for the sale of the two plots and in exchange, the 2nd Defendant was to construct and hand over to the Plaintiff two Villas, being Villas Number SPG/03/P2/H047 and SPG/03/P2/H048 each valued at Kshs.23,500,000 and that before handing over Villa 47 and 48 aforesaid, the Defendants transferred them to third parties and agreed to exchange them with two new Villas which were under construction.
12. The Plaintiff's advocate submitted that the 1st Defendant, through its agent Suraya Sales Ltd, issued them with a letter of offer dated 17th December,2014 which was accepted by the Plaintiff and that subsequent to the letter of offer, the 1st Defendant entered into an agreement for sale dated 21st September, 2015 for Villa numbers SPG/03/P3/H083 and SPG/03/P3/H090 where it was agreed that the purchase price for the said premises is Kshs. 23,500,000 per unit.
13. Counsel submitted that despite the agreements aforesaid, the Defendants have refused to hand over the suit properties to the Plaintiff as a result of which the Plaintiff continues to suffer losses; that there being no defect or failure on the part of the Plaintiff to comply with any of the conditions of the sale agreement, the Plaintiff should be allowed. Reliance was placed on the cases of *Reliable Electrical Engineers Limited vs Mantrac Kenya Limited* (2006) eKLR, *Andrew Karemi Kingori vs Joseph Waweru Njoroge* (2018) eKLR and *Thrift Homes Ltd vs Kays Investment Ltd* (2015) eKLR where the courts discussed the circumstances under which the equitable remedy of specific performance may be granted.
14. The Defendants' counsel submitted that the Plaintiff is not entitled to orders for the transfer of the suit property for failure of consideration; that contrary to the Plaintiff's assertions, no cash payment was ever made and/or received by the Defendants and that pursuant to the Agreement of July 25, 2013, the agreed consideration for the suit properties was the transfer of Jacaranda Properties to the 1st Defendant which transfer has yet to be effected.
15. It was submitted by the Defence counsel that further to the Agreement of July 25, 2013, the Plaintiff and the 1st Defendant entered into the Agreement of September 21, 2015 and that the two Agreements must be read and interpreted together to decipher the true intention of the parties.
16. Reliance was placed on the case of *Esther Kabugi Njuguna vs Martha Chebet & 3 others* [2020] eKLR where the court found that whereas there was a valid agreement between the Plaintiff and the 1st defendant, the 1st defendant who was claiming that the Plaintiff had been paid the purchase price was obligated to prove the same and having failed to do so, the court found that the lack of consideration by the 1st Defendant vitiated the contract.
17. It was submitted that having shown that the Plaintiff is not entitled to a transfer and/or ownership of the suit property, it follows that there is no basis for his claim for special damages and that in any event, the claim for special damages is not pegged on any valuation and constitutes mere speculation.



Reliance in this respect was placed on the case of *Fridah Kageni Julius vs Kenya Power & Lighting Company Limited* [2017]eKLR and *Pyramid Hauliers Limited vs Nebemiah Kinyanjui*[2021] eKLR.

Analysis & Determination

18. Having carefully considered the pleadings, the testimony and submissions herein, the issue that arises for determination is;
 - i. Whether the plaintiff has proved her case on a balance of probabilities and if so, whether she is entitled to the reliefs sought?
19. The plaintiff instituted this suit seeking, inter –alia, for a declaration that she is the bonafide purchaser of Villas Number SPG/03/P3/HO83 and SPG/03/P3/HO90 of Hibiscus Court 4 Villas erected on L.R No 28223/33(Fourways Junction) (suit property); a permanent injunctive order against the 1st Defendant; an order of specific performance compelling the 1st Defendant to effect transfer of the suit property and in default, the Deputy Registrar to execute the said transfer in favour of the Plaintiff.
20. According to the Plaintiff, her deceased husband entered into an agreement dated 21st September, 2015 for the purchase of the suit property, a fact which has been acknowledged by the 1st Defendant in clause 3 of the Sale Agreement aforesaid; that despite the lapse of the completion date, the 1st Defendant has refused to transfer and/or grant possession of the suit properties to her; that she continues to suffer loss of income due to inability to access the premises and that she is apprehensive that the 1st Defendant will dispose the same thus depriving her of her proprietary rights.
21. The Plaintiff produced in evidence the Sale Agreements dated 21st September, 2015 in respect of the two suit properties and a demand letter dated 23rd May, 2016.
22. On their part, the defendants vide their amended defence asserted that the plaintiff and the 2nd defendant entered into an agreement dated July 25, 2013 upon which the Agreement of 21st September, 2015 between the Plaintiff and the 1st defendant was founded and that pursuant to the Agreement of July 25, 2013, the Plaintiff being the owner of L.R No 28223/37 and L.R No 28223/62, agreed to transfer the same to the 2nd defendant who would in turn transfer the suit properties to the Plaintiff.
23. The defendants pleaded in the defence that the plaintiff has never made any payment in the form of cash towards the said purchase of the villas in issue as the consideration was the transfer of the Plaintiffs' properties in exchange with the villas, which transfer has yet to be effected.
24. Despite filing their defence aforesaid and documents, the defendants did not participate in the hearing and subsequently did not adduce any evidence in support of their case. It is trite that pleadings are not evidence and the legal position has always been that in the absence of evidence, the pleadings of a party remain mere allegations. This position was reaffirmed by the Court of Appeal in the case of *Charterhouse Bank Limited (Under Statutory Management) vs Frank N. Kamau* [2016] eKLR where the learned judges held as follows:

“First and foremost, there can be no quarrel with the statements...that averments by the parties do not constitute evidence. Madan, JA (as he then was) made this abundantly clear in *CMC Aviation Ltd v. Crusair Ltd* (No1) [1987] KLR 103 when he stated:

“The pleadings contain the averments of the three parties concerned. Until they are proved or disproved, or there is admission of them or any of them by the parties, they are not evidence and no decision could be founded on them. Proof



is the foundation of evidence...As stated in the definition of “evidence” in section 3 of the *Evidence Act*, evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation, is proved or disproved. Averments are matters the truth of which is submitted for investigation. Until their truth has been established or otherwise they remain unproven... The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents.”

25. The above notwithstanding, the burden on the plaintiff to prove her case remains the same and that burden of proof is in no way lessened because the defendants did not adduce evidence. In this respect, the Court of Appeal in the above cited case of *Charterhouse Bank Limited* case(supra) stated as follows:

“The suggestion, however, implicit...that in all and sundry civil cases the failure by the defendant to adduce evidence in support of his defence means that the plaintiff’s case is proved on a balance of probabilities cannot possibly be correct...While the defendant’s failure to testify has fatal consequences for the counterclaim because the onus is on him to prove it on a balance of probabilities, it does not necessarily have the same consequence for the defence where the onus is on the plaintiff to prove his claim on a balance of probabilities. The *Evidence Act* is clear enough upon whom the burden of proof lies. [see Section 107 and 109].”

26. It is undisputed that the plaintiff and the 1st defendant entered into an agreement dated September 21, 2015 for the sale of the suit properties. The validity of the Agreement is not in question. The dispute turns on whether or not the plaintiff fully complied with the terms of the agreement with respect to payment of the full purchase price entitling her to the orders sought or whether, as the defendants contend in their defence, no consideration passed from the plaintiff to the defendants, whether in cash, or through the exchange of land.
27. While the plaintiff’s case as appears from the pleadings and evidence is that she has fully paid the purchase price for the suit properties and that the 1st Defendant breached its part of the bargain as per the Sale Agreement of September 21, 2015, PW1’s oral testimony took a completely new dimension.
28. While placing reliance on the Sale Agreement of 25th July, 2013 which agreement was not pleaded, the Plaintiff asserted in her testimony that she, together with her deceased husband, agreed to transfer plots 62 and 63 to the 2nd Defendant and they would in exchange, give them the suit properties and that as a result of the exchange aforesaid, no payment was due from her husband. This narrative by the Plaintiff was repeated in her advocate’s submissions
29. It is well settled that parties are bound by their pleadings. That being the case, any evidence adduced in a matter must be in consonance with the pleadings and any evidence at variance with the pleadings must be disregarded. This position was re-affirmed by the Court of Appeal in the case of *Independent Electoral and Boundaries Commission & another vs Stephen Mutinda Mule & 3 others* (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in *Adetoun Oladeji (NIG) Ltd vs Nigeria Breweries PLC SC 91/2002* where Aderemi, J.S.C. expressed himself as follows on the importance and place of pleadings: -

“...it is now a very trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or



put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

30. Guided by the foregoing, the testimony of PW1, in as far as it creates a new narrative contrary to the assertions in the pleadings is for outright rejection. Even assuming that the Agreement of July 25, 2013 was produced into evidence by the plaintiff and the consideration pursuant to that agreement was the exchange of land, no evidence has been adduced by the plaintiff in support of this position.
31. Going back to the case as per the pleadings, it is trite law that a contract consists three fundamental elements; offer, acceptance and consideration, all of which are necessary for the existence of a valid and binding contract. It is the Plaintiffs’ case that the aggregate sum of Kshs 47,000,000 being the purchase price for the suit properties was duly paid, which, according to the Plaintiff, is evinced by the wording of Clause 3 of the Sale Agreements of September 21, 2015 which provides as follows:

“The purchase price for the said premises is Kenya Shillings Twenty-Three Million Five Hundred Thousand (Kshs 23,500,000/=) hereinafter referred to as the Purchase Price which amount has been fully settled.”
32. While conceding that clause 3 aforesaid stated that the amount has been fully settled, the court opines this in itself does not in the circumstances of this case constitute sufficient evidence to warrant a finding in favour of the Plaintiff on a balance of probabilities.
33. No independent evidence has been adduced with respect to this alleged payment by way of either cheque, payment voucher and/or receipt. More crucially, there was no corroborating oral evidence of this payment. In fact, the oral testimony of PW1 is that no money was owed by them as the contractual consideration was an exchange of land, which was also not demonstrated by PW1.
34. In light of the conflicting positions taken by the Plaintiff, the court cannot without more make a finding on a balance of probabilities that the Plaintiff performed her part of the bargain under the contract.
35. Having found that the Plaintiff has not made a case entitling her to be declared a bonafide purchaser of the suit property, it follows that the orders of specific performance cannot lie. The law is settled that a party seeking specific performance, which is an equitable remedy, must demonstrate that he has performed or is willing to perform all the terms of the agreement and that he has not acted in contravention of the essential terms of the said agreement.
36. This position was enunciated by the Court of Appeal in *Gurdev Singh Birdi & Narinder Singh Ghatora as Trustees of Ramgharia Institute of Mombasa vs Abubakar Madhbuti* [1997] eKLR where it stated as follows:

“...It cannot be gainsaid that the underlying principle in granting the equitable relief of specific performance has always been that under all the obtaining circumstances in the particular case, it is just and equitable so to do with a view to doing more perfect and complete justice. Indeed...a plaintiff must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action.”



37. That being the case, and considering the Plaintiff's contradicting evidence on the payment of the purchase price, it is the finding of this court that the order of specific performance cannot issue.
38. It is a cardinal principle of law that special damages must be specifically pleaded and proved. This position was affirmed by the Court of Appeal in *Capital Fish Kenya Limited vs The Kenya Power & Lighting Company Limited* [2016] eKLR who stated;
- “Starting with the first issue, it is trite law that special damages must not only be specifically pleaded, they must also be strictly proved with as much particularity as circumstances permit.”
39. Whereas the Plaintiff's claim was for Kshs 5,760,00 being loss of rental income at Kshs 320,000 for the two villas per month from March, 2016 to August, 2017, no evidence was provided in support of the claim. In any event, the claim for special damages would not have been awarded by this court even if the same had been pleaded and proved considering that the Plaintiff failed to prove that she is entitled to the suit properties.
40. In conclusion, the court finds that the plaintiff has not proven her case on a balance of probabilities and the same is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 23RD DAY OF JUNE, 2022.

O. A. Angote

Judge

In the presence of;

Mr. Omange for the Plaintiff

Mr. Bob Otieno for the Defendants

Court Assistant: June/Tracy

