



**Gathoni Alias Anne Wanjiku Lidonde v Mwanzia (Environment and Land Case Civil Suit 500 of 2014) [2022] KEELC 2381 (KLR) (23 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 2381 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 500 OF 2014  
LC KOMINGOI, J  
JUNE 23, 2022**

**BETWEEN**

**ANNE WANJIKU GATHONI ALIAS ANNE WANJIKU LIDONDE .. PLAINTIFF**

**AND**

**MONICA MWIKALI MWANZIA ..... DEFENDANT**

**JUDGMENT**

1. By a Plaint dated 24<sup>th</sup> April 2014, the Plaintiff prays for judgement against the Defendant for:-
  - a. Kshs.650, 000/= being 10% as liquidated damages due to the Plaintiff for the Defendant's default.
  - b. A declaration that the Plaintiff is the legal owner of the suit property being Lr No. Ngong/ngong/21441.
  - c. A permanent injunction against the Defendant restraining them from entering, trespassing, residing, cultivating and /or dealing in any way with the Plaintiff's said suit property.
  - d. An eviction order against the Defendant evicting her, her husband / representative Mr.Mwanzia Musyoka, their servants, agents and/or employees from the Plaintiff's said suit property.
  - e. Damages for trespass and destruction of the Plaintiff's property.
  - f. Costs and interest of the suit.
  - g. Such other or further relief as this Honourable Court may deem fit to grant.
2. It is the Plaintiff's case that she is the registered owner of the parcel of land known as Ngong/ngong/21441 situated within Ngong. She stated that on 27<sup>th</sup> December 2012, she entered into a sale agreement for the sale of the suit land to the Defendant for kshs.6.5 million. She further averred that



as per clause 2(a) of the agreement, the Defendant paid her kshs.2 Million as deposit and the balance of kshs.4.5 million was payable within ninety (90) days from the execution of the sale agreement as per clause 2(b).

3. It is her case that the Defendant did not honour the agreement ,prompting her to issue a 21 days completion Notice dated 12<sup>th</sup> August 2013 and subsequently a notice to rescind the agreement vide the letter dated 28<sup>th</sup> October 2013. She averred that she was entitled to retain the deposit but she refunded the Defendant through RTGS on 22<sup>nd</sup> October 2013.
4. It is also her case that that the Defendant was only allowed to have possession as a licensee upon the Plaintiff's receipt of her deposit and she was only entitled to cultivate and carry out non-permanent development on the land but she has trespassed on the Plaintiff's land and commenced construction of permanent structures.
5. She stated that she entered into a new sale agreement dated 17<sup>th</sup> January 2014 whereby the Defendant was to pay the full purchase price by 14<sup>th</sup> March 2014 but she failed again prompting the Plaintiff to issue her with a 21 days' completion notice. She added that the Defendant has refused to pay and to vacate the suit property.

### **The Defendant's case**

6. The Defendant filed her defence and counterclaim dated 3rd May 2019.She denied all allegations contained in the plaint. She admitted entering into the sale agreement dated 27<sup>th</sup> December 2012 with the Plaintiff but contended that it was an express term of the agreement that the Defendant would give the purchaser possession upon payment of the deposit, thus she entered the land with the express authority and knowledge of the Plaintiff and is not a trespasser.
7. She also admitted to entering into the sale agreement dated 27<sup>th</sup> December 2012 with the Plaintiff but contended that she was to pay the balance of kshs4.5 million pursuant to clause2 of the agreement in exchange of completion documents as set out in clause 7 of the agreement. She denied failing to honour the agreement and contended that it is the Plaintiff who failed to deliver completion documents so as to warrant remittance of the balance of the purchase price and as such, the provision of forfeiture of the deposit was not applicable. She averred that she is ready, able and willing to complete the sale and in particular pay the purchase price in exchange for the completion documents.
8. In her counterclaim, she contends that the Plaintiff is in breach of the sale agreement dated 17<sup>th</sup> January 2014 by failing to handover completion documents. She particularized the alleged breach and prayed for dismissal of the Plaintiffs suit and judgement in the counterclaim as follows:-
  - a. A declaration that the Defendant is the bona fide purchaser of the suit property being L.R No.ngong/ngong/21441 having bought it from the Plaintiff vide the sale agreement dated 27<sup>th</sup> December 2012 and the supplementary agreement dated 17<sup>th</sup> January 2014.
  - b. A declaration that the Plaintiff is in breach of the sale agreement dated 17<sup>th</sup> January 2014 aforesaid in respect of the suit property L.R No. Ngong/ngong/21441 by failing to deliver the completion documents stipulated in clause 6 thereof on or before the completion date or at all.
  - c. An order for specific performance of the agreement for sale of the suit property being L.R No.ngong/ngong/21441 dated 17<sup>th</sup> January 2014 compelling the Plaintiff to deliver the completion documents stipulated in clause 6 of the sale agreement within such duration as this Honourable Court may deem just and appropriate in exchange for the payment by the Defendant of the purchase price to the Plaintiff and/or the Plaintiff's Advocates.



- d. An order restraining the Plaintiff, her servants, agents and /or employees from evicting, threatening to evict and/or otherwise interfering with the Defendant's quiet possession of the suit property being L.R No.ngong/ngong/21441.
- e. Any other orders and Declaration and/or directions as this Honourable court deems just and appropriate.
- f. Costs of this suit.

### **The Plaintiff's evidence**

9. PW1, Anne Wanjiku Gathoni alias Anne Wanjiku Lidonde, the Plaintiff, testified on 16<sup>th</sup> December 2019. Her witness statement dated 24<sup>th</sup> April 2014 was adopted as part of her evidence in chief. She stated that on 27<sup>th</sup> December 2012, she entered into a sale agreement for the sale of the suit land to the Defendant for Kshs.6.5 million and that the Defendant paid her Kshs.2 Million as deposit and the balance of Kshs.4.5 million was payable within ninety (90) days of execution.
10. She stated that the Defendant did not honour the agreement, prompting her to issue a 21 days completion Notice dated 12<sup>th</sup> August 2013 and subsequently a notice to rescind the agreement vide the letter dated 28<sup>th</sup> October 2013 through registered post and that she refunded the Defendant the deposit of kshs.2million through RTGS on 22<sup>nd</sup> October 2013.
11. She stated that that the Defendant was only allowed to have possession as a licensee upon the Plaintiff's receipt of the deposit and was only entitled to cultivate and carry out non-permanent development on the land but she has trespassed on the Plaintiff's land and commenced construction of permanent structures.
12. She told the court that she entered into a second sale agreement with the Defendant dated 17<sup>th</sup> January 2014 and that completion date was in ninety (90) days. She added that when the period expired, the Defendant sought an extension which was granted but she did not pay the purchase price. It was her testimony that she sent her a notice to rescind through registered post but she did not respond.
13. She testified that the Defendant is occupying the suit property despite there being orders issued on 24<sup>th</sup> April 2014 and served on her restraining her from dealing with the suit land. She added that she has tried to execute the contempt orders but the Defendant always seeks more time. She stated that the defence does not raise issues of substance yet the Defendant has been on the property for five years.
14. When cross-examined and referred to the sale agreement dated 27<sup>th</sup> December 2012, she stated that she allowed the Defendant to take possession but only to plant trees. When referred to clause 7 of the said agreement, she stated that she received Kshs.2 million as deposit but she did not give the Defendant executed transfer forms, consent from spouse and that she has no evidence of consent from the Land Control Board. When referred to the 2<sup>nd</sup> agreement dated 17<sup>th</sup> January 2014, she stated that, clause 2 states that Kshs.6.5 million was to be paid on or before completion date; which was 14<sup>th</sup> March 2014. She stated that she did not deliver the documents stated at clause 6 of the agreement. She admitted that it was her responsibility to deliver them.
15. She told the court that she sent the completion notice on 23<sup>rd</sup> March 2014 through registered mail to the purchaser. She further stated that the notice does not state that she has secured all the completion documents and has nothing to show that she was ready and able to complete the transaction. She stated that she did not apply for land control board consent since the Defendant did not pay the purchase price. She stated that she has no evidence that the Defendant violated the court order and that she is not in breach of the agreement and that she is no longer willing to sell the suit property.



16. When she was re-examined and referred to clause 7 of the sale agreement dated 17<sup>th</sup> January 2014, she stated that the Defendant was to pay in full before transfer. She stated that the Defendant was not paid any amount.
17. She also stated that she filed the application for contempt against the Defendant dated 25<sup>th</sup> June 2014 for being in contempt of the orders issued on 25<sup>th</sup> April 2014.

### **The Defendant's evidence**

18. DW1, Monica Mwikali Mwanzia the Defendant, testified on 19<sup>th</sup> October 2021. She relied entirely on her witness statement dated 3<sup>rd</sup> May 2019. The same was adopted by the court as part of her evidence in chief. She stated that she entered into the sale agreement dated 27<sup>th</sup> December 2012 with the Plaintiff for sale of the suit land whereupon she paid Kshs.2 million as deposit and obtained vacant possession. She further stated that the Plaintiff through M/S Irura Nguchuga Advocates vide a completion notice dated 12<sup>th</sup> August 2013 demanded the balance of the purchase price from her notwithstanding that she was not ready to complete as she did not deliver completion documents in exchange of the balance. She added that the Plaintiff rescinded the agreement vide a letter dated 23<sup>rd</sup> October 2013.
19. She stated that they negotiated and entered into the sale agreement dated 17<sup>th</sup> January 2014 which superseded the previous agreement. She further stated that pursuant to the new agreement, the entire purchase price of kshs.6.5 million was to be paid on or before the completion date in exchange with the completion documents.
20. She stated that the Plaintiff willfully neglected to avail the completion documents and issued the completion notice dated 25<sup>th</sup> March 2014 and demanded discharge of full purchase price from her notwithstanding her breach. She stated that her efforts to pay the full purchase price were frustrated by the Plaintiff but she remains willing and ready to complete.
21. When cross-examined, and referred to the sale agreement dated 27<sup>th</sup> December 2012, she stated that the purchase price was kshs.6.5 million and that she paid kshs.2 million but she did not pay the balance of kshs.4.5 million within ninety (90) days as stipulated in the sale agreement.
22. When referred to the notice dated 12<sup>th</sup> August 2013, she stated that she was not given the notice. When referred to the RTGS dated 22<sup>nd</sup> October 2013, being a refund of the deposit, she stated that the Plaintiff did not refund the purchase price and that she had not sought a refund from her.
23. She told the court that she signed the second agreement dated 17<sup>th</sup> January 2014. When referred to clause 3, she stated that she confirms that ksh.2 million was refunded. When referred to clause 5 of the same agreement, she stated that the completion date was 14<sup>th</sup> March 2014 and she had not paid by that date. When referred to the notice dated 25<sup>th</sup> March 2014, she stated that she was not given the notice and that she has no postal address. When referred to the address contained in the second sale agreement, she admitted that it is her postal address. She stated that she was not refunded a deposit of Ksh.2 million for the second agreement and has nothing to show that she is ready to pay. She also stated that she was never served with court order restraining her from entering the suit land. When referred to the order issued on 25<sup>th</sup> April 2014, she indicated that she was not served.
24. At the close of the oral testimonies, parties tendered final written submissions.

### **The Plaintiff's submissions**

25. They are dated 19<sup>th</sup> November 2021. Counsel for the Plaintiff submitted that the Defendant is occupying the suit land despite having not paid the purchase price and despite her being served with



the orders of this court issued on 25<sup>th</sup> April 2014 restraining her from interfering with the suit property pending hearing and determination of the case.

26. Relying on the court of Appeal's decision in *Nabro Properties Ltd v Sky Structures Ltd & 2 Others* [2002] KLR, counsel submitted that the Defendant's prayer for specific performance should fail since the Defendant is in default by failing to pay the purchase price.
27. Counsel submitted that the Defendant's claim for specific performance should fail as it offends the maxim of law that no man shall take advantage of his own wrong. He relied on the case of *Standard Chartered Bank v Intercom Services Ltd & 4 others* [2004] e KLR. He also submitted that the agreement dated 17<sup>th</sup> January 2014 at clause 10 (A) provides that time was of essence therefore the agreement was automatically rescinded when the Defendant failed to pay on 14<sup>th</sup> March 2014 and when the notice was served. He relied on the case of *Sagoo v Dourado* [1983]KLR.

### **The Defendant's Submissions**

28. They are dated 16<sup>th</sup> February 2022. Counsel for the Defendant submitted that the Defendant's issues for determination are:-
  - a. Whether the Plaintiff is in breach of the agreement for sale for the suit property dated 17<sup>th</sup> January 2014.
  - b. Whether the Defendant trespassed on the suit property L.R No.ngong/ngong/21441
  - c. Whether the Defendant is the bonafide purchaser of the suit property.
  - d. Whether the court should compel the Plaintiff to surrender the completion documents to the Defendant.
  - e. Whether the court should issue an injunction to the Plaintiff restraining her, whether by herself or her agents/employees and/or servants from enjoying peaceful possession of the suit property.
29. It was counsel's submission that that the Plaintiff willfully failed to furnish completion documents yet the Defendant considers them extremely vital before discharging the purchase price to the Plaintiff. He submitted that the Defendant is not a trespasser in the meaning of Section 3 of the *Trespass Act* as the Plaintiff was aware that the Defendant has built a permanent structure on the suit land in which she resides with a view to completing the sale agreement. He also submitted that the Defendant is a *bona fide* purchaser for value and invited the court to be guided by the decision of the court in *Stancom Sacco Society Ltd v Alliance One Tobacco Limited* [2018]e KLR in interpreting the terms of the agreement between the parties. He submitted that the Plaintiff has not made a case for grant of a permanent injunction.
30. I have considered the pleadings and the evidence on record. I have also considered the written submissions and the authorities cited. The issues for determination are:-
  - i. Which party is in breach of the sale agreement dated 17<sup>th</sup> January 2014?
  - ii. Is the Defendant a trespasser?
  - iii. Who is entitled for damages for breach of contract?
  - iv. Is the Defendant entitled to an order for specific performance?
  - v. Who should bear costs of this suit?



31. The dispute herein surrounds a contract of sale over the suit land. Initially, the Plaintiff and the Defendant entered the sale agreement dated 27<sup>th</sup> December 2012. The Plaintiff offered to sell the suit land to the Defendant at Kshs.6.5 million. The Defendant paid her Kshs.2 million as deposit but failed to pay the balance of Kshs.4.5 million within ninety (90) days as stipulated the agreement. By this time, the Defendant had taken possession. Failure to pay prompted the Plaintiff to serve the Defendant with a completion notice and subsequently a notice to rescind the sale agreement. She also refunded the deposit of Kshs.2 million paid as deposit. This was admitted by the Defendant on cross-examination.
32. The parties would later enter the sale agreement dated 17<sup>th</sup> January 2014, after rescinding the sale agreement dated 27<sup>th</sup> December 2012. The agreement was for purchase of the suit land for Ksh.6.5 million. Being a contract, the court is guided by the decision of the Court of Appeal in *National Bank of Kenya v Pipeplastic Samkolit (K) Ltd & Another* [2001] eKLR when it stated: “The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved.”
33. I have gone through the sale agreement dated 17<sup>th</sup> January 2014.  
 Clause 2 provides that the purchase price was to be paid on or before completion date.  
 Under clause 3; the Defendant acknowledges she was refunded Kshs.2,000,000/- into her bank account at Cooperative Bank Ltd, Ongata Rongai Branch, Account No 01109210771000 on 22<sup>nd</sup> October 2013.  
 Clause 5 provided that the completion date is 14<sup>th</sup> March 2014.  
 Clause 7; provides that; “Upon payment of purchase price in full and due performance by the purchaser of all the terms and conditions of the Agreement the vendor shall deliver vacant possession.”
34. It is the Plaintiff’s case that the Defendant breached the sale agreement by failing to pay the purchase price, the Defendant on the other hand claims the Plaintiff failed to avail the completion documents as contained in clause 6 of the sale agreement.
35. In the case of *Sisto Wambugu vs Kamau Njuguna* [1983] eKLR; it was held that “the vendor’s right to rescind an agreement for sale for non-payment at the appointed time is only exercisable where time is of essence or where the innocent party has issued a notice to the defaulting party making time of essence.”  
 Under clause 10A of the sale agreement, time was of the essence.
36. The Plaintiff confirmed that the Defendant was served with a completion notice. The same is dated 25<sup>th</sup> March 2014. This was about eleven days after the completion date. The same was sent by registered post to the Defendant’s address which she had provided at the time of execution of the sale agreement. She has not denied that the address is hers.
37. Under Clause 5 of the sale agreement, the Defendant was to pay the full purchase price before the Plaintiff could release the completion documents. The Defendant admitted that the purchase price was Kshs.6.5 Million. When cross examined by the Plaintiff’s counsel the Defendant told the court that she had nothing to show that she had the money and was ready to pay.
38. She also denied that she was served with any court orders dated 24<sup>th</sup> April 2014. I find that the Defendant is not being truthful.
39. I find that the Plaintiff was willing to sell her property to the Defendant even after the first agreement failed. The Defendant however, failed to pay the purchase price. From the time of the filing of this suit and during the pendency, the Defendant has never intimated to the Plaintiff that she now has the



purchase price and is ready to pay. I find that the Defendant is in breach of the sale agreement dated 17<sup>th</sup> January 2014.

40. Having stated so, I find that the Defendant became a trespasser on the suit property from when this suit was filed. She was served with orders of this court dated 25<sup>th</sup> April 2014 but she declined to comply. It is clear from the affidavit of Felix Omondi, Court Process Server that she was served with the court orders. The Plaintiff admits that she let the Defendant into possession to plant trees and to put non permanent structures.
41. I find that the Plaintiff is entitled to damages for trespass which I assess at Kshs.100,000/-. I rely on the case of *Duncan Nderitu Ndegwa vs Kenya Pipeline Company Ltd & Another* [2013] e KLR where the court stated as follows:-

“On the issue of quantum of damages, once a trespass to land is established, it is actionable per se, and indeed no proof of damages is necessary for the court to award general damages”

42. Having stated that the Defendant was in breach of the sale agreement for failing to pay the purchase price, it goes without saying that the Plaintiff is entitled to damages for breach of contract. The Defendant has been on the land for more than five (5) years. The Plaintiff has been denied the use of it.
43. The Defendant is not entitled to an order of specific performance. She has been on the suit land without paying the purchase price. She constructed a permanent house on the suit land despite orders of this court issued on 25<sup>th</sup> April 2014 restraining her from further dealing with the land. She has also not exhibited willingness to complete the contract. The guiding authorities on this issue are the Court of Appeal’s decision in In *Thrift Homes Limited v Kenya Investments Limited* [2015] eKLR where it stated:-

“The remedy of specific performance like any other equitable remedy is discretionary. Second, the jurisdiction to grant the relief of specific performance is based on the existence of a valid enforceable contract. Third, specific performance will not be ordered if the contract suffers from some defect such as mistake or illegality or if there is an alternative effective remedy.”

Similarly in *Nabro Properties Limited v Sky Structures Limited & 2 others* (2002) 2 KLR 300 the Court held that:-

“A party seeking specific performance must show and satisfy court that it can comply and be ready and able; a mere statement that the appellant was ready to pay is not sufficient evidence to discharge the burden cast upon the appellant”.

44. In conclusion, I find that the Plaintiff has proved her case as against the Defendant on a balance of probabilities.
45. In essence, the Defendant’s counterclaim fails and the same is dismissed.
46. Accordingly, Judgment is entered for the Plaintiff as against the Defendant as follows:-
- a. Kshs.650, 000/= being 10% as liquidated damages due to the Plaintiff for the Defendant’s default.
  - b. A declaration is hereby issued that the Plaintiff is the legal owner of the suit property LR No. Ngong/ngong/21441.



- c. A permanent injunction is hereby issued restraining the Defendant from entering, trespassing, residing, cultivating and /or dealing in any way with the Plaintiff's said suit property, LR No Ngong/ngong/21441.
- d. An eviction order is hereby issued against the Defendant and her husband/representative Mr. Mwanzia Musyoka, their servants, agents and/or employees from the Plaintiff's said suit property, LR No Ngong/ngong/21441.
- e. General damages for trespass Kshs.100,000/-
- f. Costs and interest of the suit.

It is so ordered.

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

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**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

Mr. Jaoko for the Plaintiff

Mr. Kago for the Defendant

Steve - Court Assistant

