



**Mwambaji v Tujenge Homes Limited (Environment & Land Case
E001 of 2020) [2022] KEELC 2928 (KLR) (21 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 2928 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE E001 OF 2020**

**MAO ODENY, J
JUNE 21, 2022**

BETWEEN

ERIC MARTIN KYALO MWAMBAJI PLAINTIFF

AND

TUJENGE HOMES LIMITED DEFENDANT

JUDGMENT

1. By a plaint dated 10th September 2020, the Plaintiff herein sued the Defendant seeking the following orders: -
 - a. A declaration that the Plaintiff, Eric Martin Kyalo Mwambaji, is the bonafide and lawful owner of the parcel of land known as Malindi Fahari Garden Plot 27 out of title number: Kilifi/mbaraka Chembe/843.
 - b. An order for specific performance compelling the Defendant to subdivide the land parcel known as Kilifi/mbaraka Chembe/843 and transfer the portion delineated as Malindi Fahari Garden Plot 27 to the Plaintiff.
 - c. An order that the Deputy Registrar of the Honourable Court be granted authority to sign the documents for and on behalf of the Defendant which will be necessary to give effect of specific performance in the event that the Defendant fails to do so.
 - d. In the alternative to the above, the Defendant be ordered to refund the purchase price of Kenya Shillings Three Hundred and Fifty Thousand with interest thereon.
 - e. Costs of the suit.



- f. Interest on (d) and (e) from the date of filing at court rates until payment in full.

Plaintiff's Case

2. PW1 adopted his Witness Statement and testified that on 13th May 2019, he paid a sum of Kshs. 350,000/- being the full purchase price for the purchase of land known as Malindi Fahari Garden Plot 27 (the suit property) which was part of Title No. Kilifi/mbaraka Chembe/843 situated at Malindi Township. PW1 further stated that at the time of the purchase, the Defendant purported to be undertaking subdivision of the said land under the estate name of Fahari Garden.
3. According to PW1 his efforts to have the Defendant execute a Sale Agreement and consequently transfer ownership of the suit property and or refund the purchase price, have proved futile.
4. The Defendant neither entered appearance nor filed a defence within the prescribed period therefore the matter proceeded by way of formal proof. PW1 produced documents in support of his case and urged the court to enter Judgment as prayed in the Plaint.

Plaintiff's Submissions

5. Counsel identified two issues for determination and stated that the court should determine whether there was a legally binding contract between the parties herein and whether the Plaintiff is entitled to recovery of money paid as purchase price.
6. On whether there was a legally binding contract between the parties, counsel submitted that the actions by the parties vide email correspondence proved that there was offer and acceptance which were sufficient elements to prove the existence of a valid contract.
7. Counsel relied on the definition of a contract provided in the Black's Law Dictionary 8th Edition and the case of *Fidelity Commercial Bank Limited v Kenya Grange Vehicle Industries Limited* [2017] eKLR and *Storer v Manchester City Council* [1974] 1 W.L.R 1403.
8. Counsel submitted that a constructive trust was created by the parties who were bound by their actions and relied on the case of *Yaxley v Gotts & another* [2000] ch 162 where the court held that an oral agreement for sale of property created an interest in property and enforceable on the basis of a constructive trust.
9. Counsel further cited the *Loyds Bank PLC v Rosset* [1991] 1 AC 107, 132, where a constructive trust was declared based on a common intention and urged the court to grant the orders as prayed in the plaint with costs.

Analysis and Determination

10. This is a case where the Defendant was served with summons to enter appearance but he neither filed a Memorandum of Appearance nor a defence as provided for within the prescribed time. The case therefore proceeded undefended.
11. The evidence on record shows that the Plaintiff and the Defendant entered into an oral sale agreement for the purchase of Kilifi/mbaraka Chembe/843 as no written agreement was exhibited. The Plaintiff also stated that he did not take possession of the suit land upon purchase.

Section 3(3) of the *Law of Contract Act* provides; -

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 found-
 - (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.
12. Under Section 3(3) above, it is mandatory for a contract for the disposition of an interest in land to be in writing and signed by all the parties and to be attested by a witness for each party. The Plaintiff testified that they did not enter into a written, signed agreement and only relied on email correspondence which does not amount to a written agreement. It was further his evidence that his effort together with his lawyer to have the Defendant sign the Sale Agreement were not fruitful hence the filing of this case.
 13. The Plaintiff sought for various orders for declaration that he is the bona fide purchaser of the suit land, specific performance compelling the Defendant to subdivide the suit land and transfer a portion to the Plaintiff, order for the Deputy Registrar to sign the transfer documents on behalf of the Defendant and in the alternative a refund of the purchase price together with interest.
 14. The fact that the Plaintiff's evidence in uncontroverted does not mean that the burden of proof shifts. The Plaintiff still has to prove his/her case on a balance of probabilities as was held in the case of *Kenya Power & Lighting Company Limited...Vs...Nathan Karanja Gachoka & Another* [2016] eKLR, where the Court stated: -

“I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence is unchallenged or not.”
 15. The issues for determination is whether the Plaintiff is entitled to the remedy of specific performance which is an equitable remedy. For a party to succeed in a claim of specific performance, he or she must prove that there was a valid contract as provided for under Section 3(3) of the Contract Act. Was there a written Sale Agreement, was it signed by all the parties to the contract and was witnessed or attested to.
 16. In the case of *Reliable Electrical Engineers Ltd.....Vs...Mantrac Kenya Limited* (2006) eKLR, Justice Maraga (as he then was) stated that:-

“Specific performance like any other equitable remedy is discretionary and the Court will only grant it on well laid principles”

“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.”



17. From the email correspondences, the Plaintiff tabled evidence of payment of Kshs 350,000/ which has not been disputed. This evidence shows that there was intention between the parties to buy and sell the suit property but the only remedy that is available to the Plaintiff is the alternative remedy whereby he claimed for a refund of the purchase price.
18. Specific performance is not available to the Plaintiff as the agreement was not in writing and the principles for grant of specific performance are that even where a contract is valid and enforceable, specific performance may still not be granted if there is an alternative adequate remedy. In this case the alternative adequate remedy is a refund.
19. I have considered the evidence by the Plaintiff together with counsel's submission and the Plaintiff is entitled to a refund of the purchase price, interest at court rates from the date of filing the suit until payment in full together with costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 21ST DAY OF JUNE, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the *Civil Procedure Rules*.

