



**Njoroge v Mbogori Holdings Limited & 2 others (Environment & Land
Case 48 of 2020) [2022] KEELC 3638 (KLR) (21 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 3638 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT & LAND CASE 48 OF 2020**

**A KANIARU, J
JUNE 21, 2022**

BETWEEN

DAVID WAWERU NJOROGE APPLICANT

AND

MBOGORI HOLDINGS LIMITED 1ST RESPONDENT

CYGNUS HOLDINGS LIMITED 2ND RESPONDENT

CYRUS NJAGI 3RD RESPONDENT

JUDGMENT

1. This suit was instituted by the applicant by way of Originating Summons dated October 12, 2020. The parties in the suit are David Waweru Njoroge the applicant, while Mbogori Holdings Limited, Cygnus Holdings Limited And Cyrus Njagi are the respondents.
2. The applicant seeks enforcement of a sale agreement entered between him and the respondents. He specifically seeks for the respondents to be ordered to pay the balance of the purchase price in the sum of Kenya Shillings Five Million Five Hundred and Forty Thousand (kshs 5,540,000/=), liquidated damages in the sum of Kenya Shillings Four Million Two Hundred Thousand (kshs 4,200,000/=), which amount is equivalent to 20% of the purchase price, and payment of general damages for breach of contract.
3. Save for the prayers sought above an alternative prayer was sought for the court to order rectification of the register by directing the titles in the respondents names to be cancelled and substituted with the applicant's names. The applicant also sought for cost of suit and any other prayers that the court may deem fit.
4. In the supporting affidavit accompanying the Originating Summons, it was pleaded that the applicant was the registered owner of land parcel No Nthawa/Gitiburi/2441, 2442, 2443 and 1606 and he



attached copies of green card in support of this. That one Faustino Njeru Njoka held land parcel No Nthawa/Gitiburi/2440 on his behalf via a sale agreement dated April 2, 2014. The applicant avers to have then sold the land to the 1st and 2nd respondents through the 3rd respondent who acted as their agent. The purchase price for the five parcels of land was said to have been Kenya Shillings Twenty One Million and Ten Thousand (kshs 21,010,000/=) and a deposit of Kenya Shillings Six Hundred Thousand (kshs 600,000/=) was paid by the 3rd respondent, with the balance to be paid upon obtaining the consent to transfer from the land control board.

5. It was alleged that transfer was done to the 3rd respondent in order for him to charge the parcels of land to enable him obtain a loan and pay the balance of the purchase price with the loan amount. It was alleged also that the transfer for the parcels was made on diverse dates to wit; transfer for land parcels Nthawa/Gitiburi 2441, 2442, 2443 was made on September 17, 2014, that of land parcel Nthawa/Gitiburi/1606 made on March 25, 2015 and for land parcel Nthawa/ Gitiburi/2440 made on September 17, 2014. It was however claimed that the respondents failed to pay the balance of the purchase price amounting to kshs 5,540,000/=. It was further stated it was a term of the agreement that in the event of default, the respondents would pay 20% of the purchase price as liquidated damages. In the alternative, the applicant sought for the land parcels to be reverted to him for non-performance of the sale agreements on the respondent's part.
6. The suit was responded to via a replying affidavit dated March 30, 2021 and filed on March 31, 2021. It was sworn by Cyrus Njagi, the 3rd respondent. He confirmed having entered into a sale agreement with the applicant for purchase of land parcels Nthawa/Gitiburi/2240,2241,2242,2243,1645, 1812,1606,1411,1934,1605 and 1954, with all the land parcels going for a total consideration of Kenya Shillings Twenty One Million (21,000,000/=) being Kenya Shillings Two Hundred Thousand each (kshs 200,000 per acre). It is said that the amount was payable after the applicant obtained the land control board consent for the parcels and upon registration of the transfers in the respondents' name or their nominee.
7. It was said also that the land was to be sold with vacant possession, clear of any squatters or settlers in accordance with clause 13 of the agreement. According to the respondents, they had advanced money to the applicant who is said to have had financial problems, as the parties were awaiting registration of the transfers in order for them to pay the balance of the purchase price. The vendor is said to have transferred suit parcels Nthawa/Gitiburi/2240, 2241, 2242, 2243 and 1606, which parcels are said to represent 67.8 acres. The respondents aver to have taken possession of four parcels of land in October 2014 but were confronted by squatters and upon informing the applicant, he promised to remove them from the land, something that he is said not to have done to date.
8. It was stated that parcel of land Nthawa/Gitiburi/1606, though transferred to the applicant, had been sold to a Chinese company for excavation rights and as a result of excavation, had been damaged, top soil removed, and was unsuitable for farming. It was pleaded that parcels numbers Nthawa/ Gitiburi/1645, 1812, 1411, 1934, 1605 and 1954 had not been transferred to the respondents. The land that was not transferred is approximately 34.86 acres. The applicant was accused of being evasive and uncooperative by failing to grant vacant possession to the respondents. Regarding the payment made, it was said to be higher than the value of the land transferred and given to the respondents.
9. The applicant's case was said to be an abuse of the court process as he had failed to remove the squatters from the land and had also failed to transfer the parcels of land yet no payment was due or owing. He was accused of holding Kenya Shillings Fifteen Million Four Hundred and Seventy Thousand (kshs 15,470,000/=) yet the respondent had been unable to cultivate the land and had therefore continued to suffer loss and damage. The respondents prayed for the court to order vacant possession of the already transferred parcels of land and further for the applicant to furnish the court with full and



accurate accounts for proceeds received from land parcel Nthawa/Gitiburi/1606 and for the amount to be deposited in an interest earning account pending determination of the suit. Finally, the court was urged to dismiss the suit with costs.

10. The suit was canvassed by way of written submissions. The applicant filed his submissions on December 2, 2021. It was submitted that the respondents through their replying affidavit had made an admission that there existed a sale agreement between the parties for a consideration of kshs 21,010,000/= and further that the property had been transferred to them. The court was urged to peruse the sale agreement in order to ascertain the property sold by the applicant to the respondents. In fact the applicant is of the view that the contention is only with regard to whether or not he was paid the full purchase price.
11. The respondents were accused of failing to attach evidence as proof of having paid the balance of the purchase price as, according to the applicant, the respondents had admitted paying to the applicant a sum of kshs 15,470,000/= leaving a balance of kshs 5,540,000/=. Based on the admission by the respondents of payment of the amount, it was argued that the applicant was truthful in his pleadings. The applicant also reiterated that the agreement was specific on payment of liquidated damages in case of breach and sought to be granted the liquidated damages. The applicant sought for the court to order subdivision of land parcel Nthawa/Gitiburi/1606 and restore 0.2 Hectares back to him, which prayer he said was hinged on paragraph 5 of the sale agreement. In short, the applicant argued that he had fulfilled his obligation of transferring the suit parcels of land to the respondents, who he now decried had failed to prove that they cleared the balance of the purchase price.
12. The respondents on their part filed their submissions on March 16, 2022. They gave a detailed account of the facts in the pleadings filed by both parties. They relied on section 19 of the [Civil Procedure Act](#) which stipulates that suits shall be instituted in such manner as prescribed by the rules. Further they relied on the provisions of order 37 rule 3 of the [Civil Procedure Rules](#). The claim by the respondent is said to be for specific performance and rectification of the register. Alongside that, the supporting affidavit attached to the applicant's claim was said to have two sale agreements, one which was undated, and another which was between different parties who were not the respondents. The agreements were alleged not to anchor in order 37 rule 3 of the Civil Procedure Rules. Further, the claim made by the applicant and the issues raised therein were said to be complex and complicated. It was argued that they could not be addressed summarily by affidavit evidence. To support this, the respondents relied on the case of [Mukokinya Maritibi V Patrick Munkiri Kabundu](#) [2021] eKLR which cited with authority the case of [Kibatiri Vs Kibatiri](#) (1983) I KLR 8 and the case of [John W. Wepbukuku Vs Secretary Board of Governors, burn school](#) (2005) eKLR.
13. The respondents contended that during the hearing of the suit, they challenged the suitability of the suit and the court gave the applicant time to amend his pleadings but that this was never done. The court was urged to take into account the mode of filing of the suit in determining the case and whether the same suffices. The respondents maintained that the mode of filing the suit ought to be in accordance with the law to enable the court properly determine the issues before it. They therefore sought for the suit to be struck out with costs. They relied on the case of [Cyril J Haroo & Another Vs Uchumi Services Limited & 3 Others](#) [2014] eKLR.
14. The respondents were of the view that if the court finds that the suit was properly before it, then the court should order transfer of the suit parcels Nthawa/Gitiburi/1645, 1812, 1411, 1934, 1605 and 1954 in the respondents favour, eviction and removal of all squatters to ensure vacant possession of the parcels of land already transferred, the applicant to account for the proceeds of excavation material in L R No Nthiwa/Gitiburi/1606 and in the alternative the amount be deducted from any unpaid



balance and general damages for loss of use of land transferred and trespassed upon as a result of the excavation and degradation.

Analysis and determination

15. I have considered the pleadings, the rival submissions by the parties, and the court record in general. The applicant in the suit seeks enforcement of a sale agreement entered into between him and the respondents. In his claim, he avers to have entered into a sale agreement with the respondent for sale of land parcels Nthiwa/Gitiburi/2440, 2441, 2442, 2443, 1606 and 1954. He claims to have transferred the respective parcels of land but that the respondents failed to pay him the balance of the purchase price in the sum of Kenya Shillings Five Million Five Hundred and Forty Thousand (kshs 5,540,000/=). His claim is for payment of the purchase price balance, liquidated damages in the sum of Kenya Shillings Four Million Two Hundred Thousand (kshs 4,200,000/=) which amount is equivalent to 20% of the purchase price and payment of general damages for breach of contract. In the alternative to these prayers, he sought for rectification of the titles to have the respondents names cancelled from the register and his name be substituted therein.
16. The claim was defended by the respondents, who on their part indeed acknowledged the existence of the sale agreement between them and the plaintiff but they contested that the purchase was not only for the stated parcel of land by the plaintiff but for parcels of land Nthiwa/Gitiburi/2240,2241,2242,2243,1645, 1812,1606,1411,1934,1605 and 1954 with each acre going for Kenya Shillings Two Hundred Thousand (kshs 200,000/=), hence bringing the total to Kenya Shillings Twenty One Million One Hundred Thousand (kshs 21,100,000/=). They stated to have paid the entire purchase price but that the plaintiff had failed to transfer all the land parcels to them. Further that for the already transferred parcels of land, he had failed to grant vacant possession as the land had squatters on them. He was equally accused of selling excavation rights to a third party (a Chinese company) and the respondents had sought accounting of the proceeds from the sale.
17. Save for the averments I have stated above by the respondents, they also challenged the manner in which the suit had been instituted. They averred that the suit could not be sustained by way of originating summons and sought for the same to be struck out. Before I proceed to determine the suit on its merits, I find that the issue of striking out of the suit to be most pertinent and ought to be determined first. It is claimed that the pleadings filed have raised complex issues that cannot be determined by way of originating summons. It is said that the claim as sought does not anchor under order 37 rule 3 of the Civil Procedure Rules. The said Order 37 Rule 3 of the Civil Procedure Rules stipulates that

“A vendor or purchaser of immovable property or their representatives respectively may, at any time or times, take out an originating summons returnable before the judge sitting in chambers, for the determination of any question which may arise in respect of any requisitions or objections, or any claim for compensation; or any other question arising out of or connected with the contract of sale (not being a question affecting the existence or validity of the contract).”
18. The applicant’s claim is for enforcement of the sale agreement entered between him and the respondents. In his prayers he has sought orders of specific performance of the sale agreement, which orders fall within the ambit of order 37 rule 3 of the Civil Procedure Rules. The said orders arise out of the contract of sale as provided under the said rule. However there is the prayer sought in the alternative for rectification of the register and cancellation of the title in favour of the applicant. The issue as to the manner in which the suit should be instituted was addressed by the parties during the hearing of the suit and the court allowed the applicant to reconsider and amend his pleadings but this was not done.



19. The prayer sought by the applicant in the alternative is a complex one that would require the parties to tender evidence in hearing to demonstrate the grounds that would warrant rectification and subsequent cancellation of the title. I note the applicant has not raised issues of fraud, illegality or mistake that would be sufficient grounds for cancellation of title. However, even though no clear basis is laid, such a prayer cannot be sustained by way of an originating summons. Cancellation of title is expressly prohibited from being sought by way of Originating Summons under order 37 rule 8 of the Civil Procedure Rules.
20. That notwithstanding, I will proceed to determine the suit as if the same is properly before me. The applicant in his claim seeks orders of specific performance for enforcement of a sale agreement entered between him and the respondents. He seeks to have the respondents ordered to pay him the balance of purchase price owed in the sum of Kenya Shillings Five Million Five Hundred and Forty Thousand (kshs 5,540,000/=), liquidated damages and payment of general damages for breach of contract. In the alternative he sought for rectification of the titles to have the respondents names cancelled from the register and his name be substituted therein.
21. The entire claim is anchored on specific performance of the agreement. The consideration therefore to be made for grant of an order of specific performance was stated in the case of Reliable Electrical Engineers (K) Ltd v Mantrac Kenya Limited [2006] eKLR, where 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 influence or where it will cause severe hardship to the defendant.”
22. From the foregoing, a claim on specific performance is centered on the existence of a valid and enforceable contract between the parties. The claim cannot be granted if the contract suffers any defect such as failing to comply with the formal requirements or otherwise due to mistake or illegality. The applicant has attached a sale agreement before the court which he seeks to have enforced. The sale agreement attached herein is undated and none of the parties mentioned in the agreement has executed it. Further though indicated to have a witness, the said witness has also not executed or attested to the signing by the parties. In the circumstances, is the sale agreement valid and can be it be enforced?
23. Section 3(3) of the Law of Contract Act provides as follows:-
- “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”.

24. That section provides the salient elements that must be fulfilled for a suit on a contract in land to be well founded. The contract should be in writing, executed by the parties, and attested to by the witnesses. The undated and unsigned agreement does not meet the requirements set out under section 3(3) of the Contract Act. The agreement can therefore not be said to be valid as it suffers a material defect by failing to comply with the formal requirements. I have already mentioned that a claim of specific performance can only be sustained if there is a valid and enforceable agreement. It however seems that the respondents have acknowledged the existence of the agreement. What is in contention however are the terms of that agreement. The applicant has listed six properties, which he contends to have sold to the respondents, while the respondents are of the view that the sale was for 11 properties. The parties seem to be in agreement that the consideration for the land was around Kenya Shillings Twenty One Million and that a precise amount of Kenya Shillings Fifteen Million Four Hundred and Seventy Thousand (kshs 15,470,000/=) has been paid so far.

On one part the applicant seeks balance of the purchase price while the respondents decry of not having been granted vacant possession of the parcels already transferred and also want the court to order a transfer of the other parcels not already transferred. It seems obvious from the pleadings by the parties that there is a balance pending. However, what becomes of the claim on the parcels alleged not to have been transferred by the applicant to the respondents?

25. I find that the enforcements sought herein by the parties can only be addressed with a valid contract of sale in place. This is because the court is unable to deduce what exactly was agreed upon by the parties. Question is. Is the sale for the 11 parcels of land as claimed by the respondents or the six parcels of land alleged by the applicant? The court can easily state that the agreement attached indicates the 11 parcels, but the letter from the applicant’s advocate which he has sought to rely on indicates a sale of six parcels of land. As the agreement does not meet the requirements of a valid contract there would be a great danger in relying on it as there is evidence stating the contrary.
26. The claim by the applicant on specific performance is untenable in the circumstances and the fate befalls the rest of the prayers sought as they are tied to the agreement. The alternative prayer as I have already stated, cannot be sustained in the manner in which the suit is filed. Additionally no basis has been properly laid to warrant rectification and cancellation of title.
27. In the main therefore, the suit fails because e the agreement if fatally defective and its substance, were it even to be treated as a proper agreement, is materially at variance with what the applicant represented to the court as true.
28. There is also something necessary to be said about some of the prayers sought. The first prayer sought is that of specific performance. This prayer is an equitable remedy in the law of contract. It is usually granted where damages recoverable for breach of contract are found to be an inadequate remedy. Put another way, it is a remedy granted in lieu of damages or where in the estimate of a court of equity, it is found unconscionable that a party can resile from a contract simply because such party can pay damages. It is not therefore open to a litigant seeking the remedy of specific performance to seek damages for breach of contract at the same time. It is either one or the other, not both. Yet in the matter at hand the applicant is also seeking damages for breach of contract.
29. Further, it is also necessary to appreciate that as specific performance is a remedy in equity, a person seeking to get it should approach the court of equity with clean hands. It is trite that equity will not come to the aid of a person whose conduct in relation to the matter before the court is blameworthy or contumacious. From what has been laid before this court, the applicant’s conduct in relation to the



alleged contract has been less than satisfactory. What he also represented to the court, when viewed in light of the substance of the agreement he sought to rely on, comes across as untrue. Equity abhors this kind of behavior. This would have dis-inclined the court from granting the remedy.

30. The upshot, when all is considered, is that the suit herein is for dismissal. I hereby dismiss it with costs to the respondents.

JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 21ST DAY OF JUNE, 2022.

In the presence of Rose Njeru for Eddie Njiru for applicant and Mwenda for respondent.

Court assistant: Leadys

A K KANIARU

JUDGE

