



Vision Innovation Self Help Group v Hemwa Investments Limited (Environment & Land Case 627 of 2017) [2022] KEELC 3199 (KLR) (9 June 2022) (Judgment)

Neutral citation: [2022] KEELC 3199 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 627 OF 2017**

JG KEMEI, J

JUNE 9, 2022

BETWEEN

VISION INNOVATION SELF HELP GROUP PLAINTIFF

AND

HEMWA INVESTMENTS LIMITED DEFENDANT

JUDGMENT

1. On June 28, 17 the plaintiff filed suit against the defendant seeking the orders as set out hereunder;
 - a. General damages
 - b. Specific performance for the title documents to be registered in favour of the plaintiff and subsequently delivered to the plaintiff.
 - c. In the alternative total reimbursement of the purchase price aid of kshs 314,500/= together with interests thereon.
 - d. Costs of this suit.
2. The plaintiff avers that sometime in 2011 it entered into two sale agreements with the defendant for purchase of two parcels of land; plot no (2) Phase 2 Kiganjo-Muthaiga View and Plot 7 Gatuanyaga/Maguguni-Certificate no 489 (the suit land parcels). That the plaintiff paid a sum of kshs 314,500/= for the two plots but blames the defendant for failing/neglecting to transfer the title documents in its favour. The plaintiff is however not aware whether the defendant actually registered the said transfer documents and his numerous demands to the Defendant to effect transfer have been futile.
3. In resisting the plaintiffs claim, the defendant filed its statement of defence dated January 28, 2019 through the firm of Musungu & Co Advocates. It denied the plaintiff's averments that they entered into sale agreements for the suit land parcels and contended that it was not the registered owner of plot no 140 arising from the suit parcels of land; that the defendant had explained to the plaintiff that it had



been contracted by another company namely, Foster Trading Co Ltd to survey, subdivide and sale the various plots arising therefrom on its behalf and other buyers vide an Agreement dated October 12, 2011. That upon such subdivision, the Defendant would then transfer the various plots to the Plaintiff and other purchasers. That accordingly the Plaintiff knew that the Defendant was only an agent at the time of executing the agreements.

4. It was the Defendant's contention that the Plaintiff purchased the parcels of land based on its due diligence which revealed that the Defendant was the registered owner prior to entering into the agreement of sale dated the October 2, 2017. That thereafter it subdivided the land and sold to members of the public. That it was impossible to grant titles to the Plaintiffs as it had handed over the dispute to Foster Trading Company Limited to deal with them.
5. The Plaintiff did not file its Reply to Defence.
6. After the suit was certified ready for hearing, on March 2, 2021 the Defendant's counsel informed the Court that he had no instructions to act. That he had filed an application dated February 26, 2021 which was not on record and the Court directed him to file afresh. The matter was later heard on November 24, 2021 in the absence of the Defendant despite service as evidenced by the Return of Service sworn by Advocate Eric Ochieng on May 26, 2021.
7. The Plaintiff's chairman Dickson Mungai Njoroge testified as PW1 pursuant to an authority to act dated June 28, 2017 and filed on record. He relied on his witness statement dated June 28, 2017 in his evidence in chief. He testified that they purchased two parcels of land Plots No 7 Gatuanyaga/Maguguni and 2 - Phase 2 Kiganjo - Muthaiga View (suit lands) from the Defendant through sale agreements dated January 19, 2011 and October 12, 2011 and paid Kshs 270,000/=. He produced the documents in the list of documents dated June 28, 2017, copies of the sale agreements, receipts from the Defendant and the certificates of ownerships for the twin plots dated February 16, 2011 and May 31, 2012. He informed the Court that they were not put in possession of the lands and thus they were not in occupation. It was his testimony that the Defendant has refused, neglected and or ignored to deliver the documents of title to the Plaintiff contrary to the agreement of sale and payment of the purchase price. He added that they were never issued with any titles and urged the Court to grant the prayers in the Plaint.
8. The Plaintiff submitted that it entered into a valid agreement with the Defendant and complied with the provisions of Section 3(3) the Law of Contract Act by paying the full purchase price in the sum of Kshs 314,500/- and complying with the terms and conditions of the agreement of sale. That it has performed its part of its bargain and is entitled to the remedy of specific performance.
9. On the first issue, it was submitted that for the Court to grant specific performance, it must be satisfied that the sale agreement relied on meets the requirements of a valid contract of sale of land. That in this case the agreements were reduced into writing and signed in line with Section 3(3) of the Law of Contract Act. That the agreement contains relevant clauses including the parties' names, description of the property, purchase price and the conditions thereto and thus enforceable by the parties. In support of that argument the case of *Nelson Kivuvani vs Yuda Komora & Anor*, Nairobi HCCC No 956 of 1991 was cited. Further that specific performance is a discretionary remedy and in considering whether to grant it or not, the merits of the case are considered and whether there is an adequate alternative remedy like damage as was held by Maraga J (as he then was) in the case of *Reliable Electrical Engineers Ltd vs Mantrac Kenya Limited* [2006] eKLR.
10. Secondly the Plaintiff maintained that it has proven it's balance of probabilities and since the suit is unopposed, its testimony remains unchallenged. It urged the Court to allow its suit as prayed. Reliance



was placed on the case of *Karuru Munyororo vs Joseph Ndumia Murage & Anor*, Nyeri HCCC No 95 of 1988 as cited in the case of *Shaneebal Ltd vs County Government of Machakos* [2018] eKLR.

11. Having considered pleadings, the evidence tendered at the trial, the written submissions and all the materials placed before me the issues for determination are; whether there is a valid agreement of sale; whether the Plaintiff is entitled to the relief of specific performance and who meets the cost of the suit.
12. The Defendant failed to lead evidence during the trial of the suit hence the Plaintiffs case is uncontroverted. Having said that this does not absolve the Plaintiff from discharging its burden of proof on the required standard. It is our law that whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. See section 107 and 108 of the *Evidence Act*.
13. This Court has held before in the case of *Gichinga Kibutha vs Caroline Nduku* (2018) eKLR that;

“It is not automatic that instances where the evidence is not controverted the claimants shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.”
14. The burden of proof is not lessened even in undefended cases like the instant case. See the case of *Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & another* [2016] eKLR where it was stated that a Court should not take a Plaintiff’s case as truthful without interrogation for the reason only that it is uncontroverted. Additionally, in the case of *Kirugi and Another Vs Kabiya & 3 others* (1987) KLR 347 the Court of Appeal held that;

“The burden was always on the Plaintiff to prove his case on a balance of probabilities even if the case was heard as formal proof”. Likewise, failure by the Defendant to contest the case does not absolve a Plaintiff of the duty to prove the case to the required standard.”
15. The substance of the Plaintiff’s case is that it purchased two parcels of land from the Defendant who has since failed to transfer the title documents to it. The Plaintiff thus seeks an order of Specific Performance directing the Defendant to transfer the suit parcels of land to it and in the alternative refund of the purchase price of Kshs 314K paid to the Defendant.
16. Before the Court determines whether the Plaintiff is entitled to the relief of specific performance, it must first of all satisfy itself whether indeed the sale agreement between the parties meets the requirement of a contract of sale of land. The Plaintiff has produced two agreements for sale dated January 19, 2011 and October 12, 2011. Both agreements are entered into between the Plaintiff and Francis Kimani Mwangi T/A Hemwa Investments Limited. In the 1st agreement the Defendant is disclosed as the registered owner of the land Plot No 7 Gatwanyaga/ Ngoliba (Magogoni) measuring 40*80 each within land reference no 379 block 1 Gatwanyaga /Ngoliba. The price is indicated as Kshs 100,000/-. Possession was agreed to be immediately upon execution of the agreement. The vendor was said to have engaged a surveyor for purposes of subdivision of the land and that the land was bare at that time of agreement. The parties contemplated the event of default and provided that any party in breach shall pay the innocent party a penalty of 25% of the purchase price together with any outgoings.
17. The second agreement dated October 19, 2011 is with respect to Plot No 2 Phase 2 Kiganjo Muthaiga View of Thika Municipality measuring 40*80 within the larger plot no 379 Block 29 and the purchase price is disclosed at Kshs 180,000/- payable by installments. Possession was promised upon execution of the agreement of sale. Similar penalty in the event of breach was agreed by the parties.



18. Both agreements are executed by the parties and duly witnessed.
19. The Plaintiff further led evidence that it paid the full purchase price for the plots and annexed the receipts from the Defendant together with plot ownership certificate.
20. Section 3 (3) of the Contract Act provides as follows;

“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.”
21. Going by the evidence led at the trial and the analysis above, the Court finds that the agreement of sale meets the requirements set out in Section 3 (3) of the Law of Contract Act and the inevitable conclusion is that there exists a valid agreement between the parties.
 22. The second issue for determination is whether the Plaintiff is entitled to the remedy of specific performance. Specific performance is a discretionary and equitable remedy. In the case of *Reliable Electrical Engineers Ltd vs Mantrac Kenya Limited* (2006) eKLR, the Court held as follows:

“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 unenforceable. 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 are an adequate remedy specific performance may still be refused on the ground of undue influence or where it will cause severe hardship to the Defendant.”

23. For a Court to grant specific performance, it must be satisfied that there existed valid and enforceable contract between the parties. This was held in *Gharib Suleman Gharib V Abdulrahman Mohamed Agil LLR No 750 (CAK)* Civil Appeal No 112 of 1998 as follows;

“The jurisdiction to order specific performance is based on the existence of a valid and enforceable contract and being an equitable relief, such relief is more often than not granted where the party seeking it cannot obtain sufficient remedy by an award of damages the focus being whether or not specific performance will do more perfect and complete justice than an award of damages.”



24. That position was affirmed in the Court of Appeal in the case of *Gurdev Singh Birdi & Another vs. Abubakar Madhbuti* (1997) eKLR cited by the Defendant that:

“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, as is set out in paragraph 487v of volume 44 of Halsbury’s Laws of England, Fourth Edition, a Plaintiff seeking equitable remedy of specific performance of a contract: ‘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...Where a condition or essential term ought to have been performed by the Plaintiff at the date of the writ, the Court does not accept his undertaking to perform in lieu of performance but dismisses the claim.’”

25. In this case, the Court has held that there is a valid agreement between the parties that was duly executed. Further the said agreement has not been challenged and or vitiated as no allegations of illegality or otherwise were proved. It was the Plaintiff’s case that the Defendant has refused to transfer the suit lands to it and has called in aid specific performance in his favour. The impugned parcels of lands were purchased eleven years ago. There is no proof of their current ownership through official searches. The Plaintiff failed to even show whether or not the Defendant owned the lands in the first place. The Plaintiff did not address the allegations of the Defendant in his statement of defence that the land belonged to Foster Trading Limited and that its role was as an agent. The Court will not be able to know the real owner of the land given this line of unrebutted pleading on record.

26. Be that as it may, it follows that even if this Court were to grant the order of specific performance, it is not clear whether the same will be executable given the lacuna observed by the Court above. It is trite that even where a contract is valid and enforceable like in this case, specific performance may not be granted where there is an alternative remedy.

27. I do not consider any award of general damages in this case because the parties agreed on a penalty of 25% of the purchase price. The Court is of the view that this compensates the Plaintiff for any damage suffered as a result of the failure to complete the transaction.

28. Based on the above reasons, the remedy for the Plaintiff is for refund of the purchase price payable by the Defendant. The Plaintiff has expressed doubt as to whether the title has been registered or not.

29. Final orders and disposal;

- a. The Plaintiff is entitled to a refund of the purchase price in the sum of Kshs 314,500/- together with a penalty of 25% on the principal amount.
- b. In addition, the Plaintiff is entitled to interest on the principal and penalty at Court rates from the date of this judgement until payment in full.
- c. I make no orders as to costs.

30. It is hereby ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 9TH DAY OF JUNE 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE



Delivered online in the presence of;
Odhiambo holding brief for Omollo
Defendant - Absent
Court Assistant – Phyllis

