Ndungu & 2 others v Ruigu & another (Environment & Land Case 28 of 2019) [2022] KEELC 13270 (KLR) (29 September 2022) (Judgment)

Neutral citation: [2022] KEELC 13270 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ENVIRONMENT & LAND CASE 28 OF 2019

JG KEMEI, J

SEPTEMBER 29, 2022

BETWEEN

JOSEPH NGIGI NDUNGU ..... 1ST PLAINTIFF

ANDREW MWANGI WACHINJI ..... 2ND PLAINTIFF

ANTONY MWANGI KARIUKI ..... 3RD PLAINTIFF

AND

JACK BONIFACE RUIGU ..... 1ST DEFENDANT

KAHUTHU ANTHONY MAGERIA T/A KAHUTHU & KAHUTHU CO. ADVOCATES ..... 2ND DEFENDANT

JUDGMENT

1. The Plaintiffs filed this suit against the Defendants on the 8/2/2019. The dispute arises from an agreement of sale entered into on the 8/9/2014 between the Plaintiffs on the one hand and the 1st Defendant on the other hand. The subject of the sale being Ruiru East/Juja East Block 11/4804 (suit land) registered in the name of the 1st Defendant.

2. The Plaintiffs sought the following prayers;

    a. An Order under Section 26 of the *Land Registration Act*, 2012 ordering the cancellation of title deeds to Land Reference Numbers Ruiru Eeast/Juja East Block II/27785-27807 and any other subdivisions being illegal subdivisions of Ruiru East/Juja East Block II/4804 and all transactions accruing there from be and are hereby declared null and void.

    b. A permanent injunction order restraining the Defendants whether by themselves or through their agents, kin, advocates, servants, workers, or anyone claiming under them from trespassing, harassing, evicting, disposing off, selling, charging, building and/or in any other

manner interfering with the Plaintiffs' ownership, quiet use, possession and occupation of the suit land Ruiru East/Juja East Block II/4804 or its resultant subdivisions.

c. A mandatory order directed to the Chief Land Registrar/District Land Registrar that all entries entered in the register and/or Green Cards over Ruiru East/Juja East Block II/4804 from the date of sale on September 8, 2014 be and are hereby cancelled and declared null and void.

d. An order for specific performance of the sale agreement dated September 8, 2014 and in default the Deputy Registrar be authorized to execute all relevant documents to effectuate the transfer of the suit land to the Plaintiffs' names and favour.

e. A declaration that Land Reference Number Ruiru East/Juja East Block II/4804 and any subsequent subdivisions thereof belongs to the Plaintiffs (and the rightful beneficiaries claiming under them) to the exclusion of the Defendants or anyone claiming title under them whatsoever.

f. General and punitive damages for breach of contract.

g. Costs of this suit and interest thereof.

h. Any other relief that the Honourable Court may deem fit to grant.

3. It is the case of the Plaintiffs that they purchased the suit land from the 1st Defendant; paid 85% of the purchase price but instead the 1st Defendant refused to transfer the land to them and proceeded to subdivide the land into 24 plots and sold to third parties who have been disclosed in the plaint. Under para 13 of the Plaint the particulars of fraud, malice and breach of contract on the part of the Defendants have been pleaded and particularized.

4. The Plaintiffs case against the 2nd Defendant is that of releasing the original title to the 1st Defendant under a cloud of fraud, without their consent albeit the same having been held to their order and to be released to them on the full payment of the purchase price.

5. The 1st Defendant has denied the Plaintiffs claim and insists that the Plaintiffs have breached the contract of sale by failing to complete the payment of the purchase price.

6. The 2nd Defendant denied the Plaintiffs claim and sought to put them in the strictest proof.

7. At the hearing the Joseph Ngige Ndungu testified on his behalf and that of the Plaintiffs. He relied on his witness statement dated the February 8, 2019 and produced documents marked as PEX No 1-8 in support of his case.

8. He informed the Court that the Plaintiffs entered into an agreement for sale on the September 8, 2014 for the purchase of the suit land for the sum of Kshs 3,850,000/-. The completion date was 90 days from the signing of the agreement of sale. He admitted that the sale was not completed within 90 days. That they stopped paying the purchase price when the 1st Defendant retrieved the original title from the 2nd Defendant. That he and his co-Plaintiffs were land brokers trading under the name of Cornerstone Investments, Mwathe Investments and One Enterprises Ltd.

9. Further, the witness informed the Court that they sold the land to third parties immediately after the execution of the agreement of sale and before obtaining title and or taking possession of the same from the 1st Defendant and without the consent of the 1st Defendant. Furthermore that the Land Control Board consent was not obtained either. According to him the balance of the purchase price is Kshs 400,000/-. He accused the 2nd Defendant of releasing the title he held to their order upon the payment

of the full purchase price to the 1st Defendant without their consent. That though the 1st Defendant gave them 7 days to pay up the purchase price, they failed to comply.

10. The 1st Defendant testified and relied on his witness statement dated the 3/4/2021 as well as the statement of defence. He confirmed to the Court that the sale price was Kshs. 3,850,000/- out of which Kshs 1,400,000/- was paid as deposit on the execution of the agreement. Maintaining non-receipt of the cash, the witness admitted that Kshs 300,000/- was deposited in his account at Equity Bank Limited on the December 18, 2014. In addition, Kshs 200,000/- was also remitted to his account at the bank. That the purchaser failed to pay within 90 days of the completion of the agreement whereupon he caused letters to the Plaintiffs demanding payment in default the agreement stood rescinded. That in 2016 he met with the 3rd Plaintiff and who on his request gave him 7 days to complete the payment of the purchase price in vain. The Plaintiffs having again failed to complete the sale, that he subdivided the suit land in 2016 into 24 subplots. That the agreement was formally rescinded on the 6/7/2015.

11. The 2nd Defendant led evidence and stated that he acted for both parties in the agreement. That no monies were paid through his firm but only drafted the agreement of sale on behalf of the parties. He relied on his witness statement dated the 3/4/2019 and produced documents contained in the list of documents dated the November 11, 2020 in support of his defence. That the purchasers disappeared after paying the deposit and he wrote letters dated the October 8, 2014, December 11, 2014 and February 9, 2015 demanding completion of the transaction on the part of the Plaintiffs. That the letters elicited no response from the Plaintiffs. He confirmed that he held the original title pending the payment of the purchase price but when he realized that the Plaintiffs were selling the land to third parties, coupled with nonpayment of the purchase price and non-responsiveness to his demand letters he released the title to the owner, the 1st Defendant. It was his evidence that the Plaintiffs breached the agreement of sale by failing to pay the balance of the purchase price within the stipulated time agreed in the agreement of sale. That he together with the 1st Defendant served the demand letters upon the Plaintiffs in Ruiru demanding the completion of the agreement which service elicited no response.

12. Parties have filed written submissions which I have read and considered.

13. It is not in dispute that the suit land was registered in the name of the 1st Defendant on the 15/4/2013. According to the undisputed evidence the said mother title was subdivided in 2016 into 24 titles namely parcel No 27785 -27807 and registered in the name of the 1st Defendant.

14. It is commonly acknowledged that the Plaintiffs and the 1st Defendant herein entered into the agreement of sale on the 8/9/2014 for the sale of the suit land at the sum of Kshs 3.850 Million, out of which Kshs 1.4 Million was paid on execution and the balance thereof was payable on the 30/9/2014 (1.0M) and 1.450 Million was due on the 8/12/2014, the completion date. Time was of essence in the agreement. Possession was to be given on completion, which was 90- days from the 8/9/2014. The parties provided for penalties in the event of default. The title was to be held by the lawyer pending the payment of the full purchase price before being released to the Plaintiffs.

15. Having considered the pleadings, the evidence adduced at the hearing, the written submissions and all the material placed before me, the issues for determination are;

    a. How much money was paid by the Plaintiffs to the 1st Defendant under the agreement?

    b. Was the agreement breached and by whom

    c. Has the Plaintiff proven fraud on the part of the Defendants?

    d. Are the Plaintiffs entitled to an order for specific performance?

Consideration Paid

16. It is the 1st Defendants case that no other monies were paid to him. The Plaintiffs have argued that the only balance of the purchase price is Kshs 400,000/-. In addition to the deposit of Kshs 1.4 Million it is alleged by the Plaintiffs that the 1st Defendant was paid additional monies by the Plaintiffs as follows;

    a. 1/10/2014 – Kshs 690,000/- cheque drawn in the name of the 1stDefendant

    b. 1/10/2014 – Kshs 160,000/- in cash

    c. 18/12/14 - Kshs 300,000/- - deposited into a/c

    d. 23/12/14 - Kshs 100,000/- deposited into a/c

    e. 4/2/15 - Kshs 200,000/- deposited into a/c

    f. 17/10/16 - Kshs 150,000 – bankers cheque drawn in the name of the 1st Defendant.

17. Although the 1st Defendant has denied receipt of any monies, he admits that the account in which the monies were deposited was his. The Court finds that all the monies deposited into the disclosed account was paid and received by the 1st Defendant. That is to say Kshs 2.0 Million. The sum of Kshs 150,000 in form of banker's cheques is discounted because the Plaintiffs have not proved that the same was credited to the account of the 1st Defendant. This could have been through a bank statement to show that indeed the said amount was credited to the account. This applies to the amount of Kshs 690,000/- by way of personal cheque dated the 1/10/2014. Similarly there was no acknowledgement in writing of the amounts in the sum of Kshs 160,000/- said to have been paid in cash to the Plaintiff.

18. It was incumbent upon the Plaintiffs to prove that the sums were either acknowledged and or deposited into the 1st Defendant's account. In the absence of acknowledgement by the 1st Defendant and to the extent that there was no such supporting documents for the payments amounting to Kshs 900,000/-, the Court is unable to make a finding that the same was paid.

Breach

19. It is on record that the agreement of the parties was subject to the Law Society Conditions of sale. It is also undisputed that time was of essence.

20. It was a term of the agreement that completion was for 90 days. It is clear that the Plaintiffs failed to complete the agreement of sale as stipulated, the completion date being the 8/12/2014. Evidence was led by DW2 and DW1 that the 1st Defendant accommodated the Plaintiffs in vain. It was the evidence of PW1 that they did fail to pay for the land even after being given the last notice of 9/2/15 where time to complete was extended for 7 days in default the agreement stood terminated. It is not in dispute that the original completion was varied by the parties themselves. I say this because the 1st Defendant continued to receive part of the purchase price on various dates as December 23, 2014 (Kshs 100,000/-); 18/12/14 (Kshs 300,000/-); 4/2/2015 (Kshs 200,000/-).

21. The Parties anticipated acts of default and incorporated the same in the agreement and under para 11 it is provided that should any of the parties hereto default in executing their respective obligations as follows;

> " Provided that should any of the parties hereto default in executing their respective duties the innocent party shall be entitled to recover any sum due with interest thereon at the rate of 20% and if the purchasers defaults in payment of the title registered in the purchasers name

and executed without payment of the said transfer of shares shall be cancelled and reversed unconditionally to read the vendors names automatically for lack of payment of the sale proceeds if at all."

22. It is the finding of the Court that the Plaintiffs breached the agreement of sale by failing to pay the full purchase price. The Plaintiffs therefore having been in breach cannot be said to be an innocent party.

Fraud

23. It is the Plaintiffs case that the Defendants committed acts of fraud against them. Fraud is a serious allegation which must not only be pleaded but proved on a high standard higher than that of standard of probabilities but lower than beyond reasonable doubt. It was incumbent upon the Plaintiffs to proof fraud, the same cannot be inferred by the Court.

24. The Plaintiffs are unhappy that the 2nd Defendant released the original title to the 1st Defendant who went ahead and subdivided into 24 plots and registered in his name. It is trite that once an agreement of sale is executed the subject of the sale must be preserved in the state that it was contracted. The reason is that same must be available for purposes of conveyance at the time of completion. It was the case of the DW2 that he released the title to the 1st Defendant when he realized that the Plaintiffs were not taking his calls nor ready to complete the agreement.

25. It is admitted by DW2 that he held the title pending the completion of the payments in full by the Plaintiffs. Having seen that the Plaintiffs were in default, he cannot be blamed in returning the title after the agreement of sale had been terminated by the 1st Defendant. I find no grounds to support an allegation of fraud on the part of the 2nd Defendant.

26. The Plaintiffs have admitted selling the land to 3rd parties before they acquired any interest in the same. I have perused one of the agreements admitted by the Plaintiffs of 26/9/2014 where the Plaintiffs held themselves out as the registered owners of the suit land before the completion of the agreement. Far from it. if this is not fraud what is it? The Court finds that at this point the Plaintiffs are yet to acquire any interest. The land is registered in the name of the 1st Defendant and this is a glaring act of fraud on unsuspecting 3rd parties. I shall return to this later in this judgement.

27. The 1st Defendant has admitted subdividing the property two years after the execution of the agreement of sale and when he realized the Plaintiffs were not keen in completing the transaction. The 1st Defendant led evidence that he met the 3rd Plaintiff and gave him time to complete the agreement in 2015 before he embarked on the subdivision. It suffices to note that though the suit land was subdivided the resultant titles are registered in the name of the 1st Defendant so much so that if the Plaintiffs had completed payment the 1st Defendant was still capable of transferring the land to them on account that he remained the registered owner of the plots.

28. I find that the Plaintiffs have not established or proved fraud against the Defendants.

Specific Performance

29. Specific performance is an equitable remedy grounded in the equitable maxim that equity regards as done that which ought to be done and as an equitable remedy. It is decreed at the discretion of the Court and the basic rule is that specific performance will not be decreed where the common law remedy such as damages would be adequate to put the Plaintiff in the position he would have been but for the breach. 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 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 the case of *Reliable Electrical Engineers Ltd V Mantrac Kenya Ltd* (2006)eKLR the Court went ahead to state that even where damages are not 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.

30. Another reason why specific performance cannot issue is based on the conduct of the Plaintiff. In the case of *Palmer Vs Lark* (1954) 1 Cha 182 and *Openda Vs Ahn* (1984) KLR 2018 the Court held that a purchaser must pay or render at the time and place of completing the sale the purchase price to the seller and this is a condition precedent for specific performance of the agreement.

31. A person seeking an order for specific performance must show and satisfy the Court that it can comply, that is to say ready willing and able to do so and mere statements are not enough. In this case the situation would have been different if the Plaintiffs deposited the deposit and the balance of the purchase price in Court or raised an appropriate guarantee in favour of the 1st Defendant. This would have served to show their readiness and willingness to perform their part of the agreement. They did not.

32. There is another reason why the relief of specific performance is not available to the Plaintiffs. As stated earlier this is a remedy available in a Court of equity. This Court is both a Court of law and a Court of equity. Having found that the Plaintiffs have come to Court with hands tainted with admitted fraud and misrepresentation, an equitable relief in the nature of specific Performance is not available to them. I say this because the Plaintiffs sold land of the 1st Defendant under the pretext that they were the owners. The Court cannot look the other way and countenance an illegality and fraud. In making that proposition, I rely on the case of *Macharia Mwangi Maina & 87 others Vs David son Mwangi Kagiri*[2014] eKLR in which the Court of Appeal held as follows:-

> " This Court is a Court of equity; equity shall suffer no wrong without remedy. No man shall benefit from his own wrong doing, and equity detests unjust enrichments. This Court is bound to deliver substantive rather than technical and procedural justice."

33. Is the 1st Defendant going to be unjustly enriched? I have noted that the Plaintiffs by dint of either design or default have not pleaded for a refund of the purchase price. It is trite that equity loathes unjust enrichment. Where the 1st Defendant retains the land as well as the purchase price, certainly he would be enriching himself unjustly, a position frowned upon by a Court of equity. The doctrine of unjust enrichment and the remedy of restitution are aimed at countering unjust benefit upon the realization that to allow a Defendant to retain such a benefit would result in his/her being unjustly enriched at the Plaintiff's expense, a position that cannot be tolerated in the law. I am persuaded by the decision of Madan, JA (as he then was) in the case of *Chase International Investment Corporation and another Vs Laxman Keshra and others* (1978) KLR 143 at page 154 where it was stated that a claim may properly be founded for restitution where it would be unjust to allow a party to retain the benefits of an unjust enrichment. The learned Judge stated inter alia:

> " Woe unto the day when it is lost sight in Kenya, which would also be contrary to the spirit of section 3(c) of the *Judicature Act*. I trust that in future, in appropriate cases, there will be less smothering of just equitable rights on the basis of technical objections and artificial distinctions oblivious to justice and substance."

34. In the case of *Chase International Investment Corporation* (*supra*), the basic elements presupposed by the doctrine of unjust enrichment are (1) that the Defendant has been enriched by the receipt of a benefit, (2) that he has been so enriched at the expense of the Plaintiff to allow the Defendant to retain

the benefit in the circumstances of the case. These subordinate principles of the general principle of unjust enrichment are interrelated. They clearly show the nature of restitutionary claims, and how people incur restitutionary obligations.

35. In other words, the idea of unjust benefit is intended to prevent a person from retaining money or some benefit derived from another which it is against conscience that he should keep it, and he should, in justice, restore it to the Plaintiff. The gist is that a Defendant, upon the circumstances of the case, is obliged by the principles of natural justice and equity to make restitution. Lord Goff of Chievely and Professor Gareth Jones state in their monumental treatise, *The Law of Restitution*, 5th Edition (1998) at PP 11-12:

> " Most mature systems of law have found it necessary to provide, outside the fields of contract and civil wrongs, for the restoration of benefits on grounds of unjust enrichment."

36. To serve the equitable remedy of restitution and to avoid unjust enrichment, I find no difficulty in ordering a refund of the monies received by the 1st Defendant from the Plaintiffs.

37. In conclusion, I find that the orders that will serve the ends of justice in the circumstances of this case are as follows;

    a. The Plaintiffs' suit therefore partially succeeds.

    b. The agreement of sale dated the 8/9/2014 stands terminated.

    c. The 1st Defendant is ordered to refund the Plaintiffs the sum of Kshs 2.0 Million within a period of 30 days in default the same shall be recoverable summarily. The said sums shall attract interest at Courts rates from the date of this judgement till payment is made in full.

    d. The costs of the suit shall be borne by the Plaintiffs in favour of the Defendants.

38. It is so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 29TH DAY OF SEPTEMBER 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Karwanda HB Wachira

Kahuthu HB Nganga

Kahuthu HB Ms. Wairimu

Court Assistant – Phyllis Mwangi