



**Thomas v Ireri (Environment & Land Case E004 of 2022)  
[2024] KEELC 1588 (KLR) (6 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1588 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT EMBU  
ENVIRONMENT & LAND CASE E004 OF 2022**

**A KANIARU, J  
MARCH 6, 2024**

**BETWEEN**

**CYRUS WACHIRA THOMAS ..... PLAINTIFF**

**AND**

**MAURICE VICTOR KIURA IRERI ..... DEFENDANT**

**JUDGMENT**

1. The plaintiff herein- Cyrus Wachira Thomas – impleaded the defendant–Maurice Victor Kiura Ireri–vide a plaint dated 23.12.2021 and filed on 24.01.2022. It is pleaded that on 22.04.2014, the plaintiff and the defendant entered into a sale agreement wherein the defendant sold to the plaintiff the whole of LR Ngandori/Kirigi/T. 163 measuring approximately 0.05 Ha. That the purchase price was agreed at Kshs 480,000 wherein the plaintiff received and acknowledged receiving Kshs 372,000/= between 22.04.2014 and 01.05.2014.
2. That the defendant gave the plaintiff vacant possession of the suit land and expressly authorized him to take physical ownership, use, and control of the said land pending the transfer of it to the plaintiff. It is said that since 01.05.2014, the defendant failed to transfer the suit property to the plaintiff as agreed or refund money paid amounting to Kshs 372,000/= and /or concede to payment of 30% liquidated damages for breach of contract as per the sale agreement. It is on these grounds that the plaintiff wishes this court to grant him; orders of specific performance of the sale agreement; or in the alternative a refund of Kshs 372,000 plus liquidated damages calculated at 30% of Kshs 480,000/= plus costs of the suit.
3. The defendant, despite being served with the Summons to enter appearance, did not enter an appearance in the case and/or file a defence. He also did not participate in the proceedings of the case despite being notified of the same.



4. The matter proceeded in his absence on the date set down for hearing that is on 16.12.2023. Only the plaintiff testified. He began by adopting his witness statement as evidence in his case. He produced the sale agreement dated 22.04.2014 as Exhibit No 1, the acknowledgement of payment of Kshs 140,000 dated 15.05.214 as Exhibit No 2, a Demand letter dated 30.03.2021 as Exhibit No 3 and the order granted to file the suit out of time issued on 21.06.2021 as Exhibit No 4. He testified that he is interested in the prayer for specific performance although it may be difficult to enforce. That he would wish the court to grant him the alternative prayer of refund and for costs of the suit. He then closed his case. His advocate opted not to file submissions.
5. I have taken into consideration the plaintiff's case, the evidence produced as well as the plaintiff's testimony. The defendant in this case did not enter an appearance or defend the suit. However this does not mean that the plaintiff automatically gets the prayers sought. This court still has to interrogate his evidence and make an assessment of the same to determine whether the plaintiff has proved his case to the required standard which is on a balance of probabilities.
6. See the case of *Gichinga Kibutha v Carooline Nduku* (2018) eKLR, where the Court held 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.”

And *Kenya Power & Lighting Company Limited v 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.”

7. The Plaintiff in his testimony testified that he would wish to be granted the alternative prayer of a refund. However, it was not stated what would happen to the first prayer of specific performance. Parties are bound by their pleadings, and the first prayer having not been withdrawn, this court has to still make a determination on the same. I therefore find that the issues for determination are;
  - a. Whether the plaintiff is entitled to an order of specific performance of the agreement dated 22.04.2014.
  - b. Whether the plaintiff is entitled to a refund of the sum of Kshs 372,000/= plus liquidated damages calculated at 30% of Kshs 480,000.
8. An order of specific performance is usually a discretionary one as was stated in the case of *Reliable Electrical Engineers Ltd v Mantrac Kenya Limited* (2006) eKLR, wherein the court 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 are adequate remedy specific performance may still be refused on the ground of undue influenced or where it will cause severe hardship to the Defendant.”

9. As seen above the plaintiff has to first establish that there exists a valid and enforceable contract before he can be granted an order of specific performance. Section 3(3) of the [Contract Act](#) requires all transactions for disposition of land to be reduced into writing. The contract also must be signed by all the parties to the transaction and must be attested to. That section 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 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.

10. The Plaintiff in this case alleges that he entered into a sale agreement with the Defendant for the purchase of Ngandori/Kirigi/T.163 the suit property. He produced the said agreement as his Exhibit No 1. I have looked at the said agreement, the same is dated 22.04.2014 and entered into between the Plaintiff and the defendant. The agreement is for the purchase of the suit land for the consideration of Kshs 480,000 with part payment of Kshs 200,000 on execution and signing of the agreement. The balance of Kshs 280,000 is said to be paid after succession. The agreement is signed by the two parties and attested to by two witnesses, that is Felix Ndwiga Njuki and Leonard Rutere Kiura. The agreement therefore meets the requirements of Section 3(3) of the [Contract Act](#) and in the absence of any evidence of mistake or illegality, the contract is valid and enforceable.
11. It then follows that the court has to interrogate whether there is an adequate alternative remedy which may be available to the plaintiff which can be in the form of damages. Indeed the plaintiff has made an alternative prayer for the refund of the sum of Kshs 372,000/= which he says he paid to the defendant as part of the purchase price. The sale agreement indicates that the defendant was paid the sum of Kshs 200,000 on execution and signing of the Agreement. This fact was not controverted by the defendant and the court having found that the agreement was valid and enforceable the court also finds that the defendant did receive the sum of Kshs 200,000. The plaintiff also produced an acknowledgement by the defendant that he received the sum of Kshs 140,000 being part payment towards the sale of the suit land. This evidence was also not controverted.
12. The plaintiff therefore only managed to prove payment of Kshs 340,000 being the consideration for the purchase of Ngandori/Kirigi/T.163. The court finds that this is what he would be entitled to.



13. The Plaintiff equally made a claim for liquidated damages for breach of contract calculated at 30% of Kshs 480,000 as per the sale agreement. Clause 8 of the sale agreement provided as follows:

“Whoever breaches the terms and conditions of this agreement in any manner afore stated shall pay to the other party 30% of the consideration as liquidated damages”

14. To consider whether the plaintiff is entitled to the said damages, the court has to consider whether there was any breach of contract. The agreement was for the sale of the whole of parcel No Ngandori/Kirigi/T.163 at the consideration of Kshs 480,000. The plaintiff was to pay the defendant the sum of Kshs 200,000 after execution of the agreement and the balance was to be paid ‘after succession’ which this court interpretes to mean ‘after transfer.’ The plaintiff did indeed pay the sum of Kshs 200,000 and a further sum of Kshs 140,000 to the defendant. The defendants obligation was therefore to transfer the land to the plaintiff which he failed to do.

15. In the court of appeal case of *Mwangi v Kiiru* (1987) eKLR, the court while quoting Lord Diplock had this to say about breach of contract: “Every failure to perform a primary obligation is a breach of contract. The secondary obligation on the part of the contract breaker to which it gives rise by....common law is to pay monetary compensation to the other party for the loss sustained by him in consequence of the breach”

16. The plaintiff in this case failed to perform his part of his obligation which was to transfer the suit land to the defendant. He can therefore be said to be in breach of the sale agreement. Now, as per the sale agreement in case of breach of the agreement, the party that was in breach was to pay the other party 30% of the consideration which in this case was Kshs 480,000 as liquidated damages. This Court having found that the Defendant was in breach of the said agreement further finds that the Plaintiff is entitled to liquidated damages of 30% of Kshs 480,000. Simple calculation shows that 30% of 480,000/= is 144,000/-.

17. Ultimately, the court finds that the plaintiff has proved to the required standard of balance of probabilities that he did pay Kshs 340,000 to the Defendant for purchase of the suit property which the defendant has failed to transfer to him. Consequently, the court enters judgment for the Plaintiff against the Defendant in the following terms:-

- a. The Court declines to grant an order of specific performance of the agreement dated 22.04.2014 but orders that the Defendant do refund the full purchase price of Kshs.340, 000 to the plaintiff.
- b. The plaintiff is also entitled to liquidated damages of 30% of Kshs 480,000 as per the terms of the sale agreement. This translates to Kshs 144,000.
- c. The Plaintiff is awarded costs of the suit.

**JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 6<sup>TH</sup> DAY OF MARCH, 2024**

In the presence of M/s Rigaga for Eddie Njiru for plaintiff and in the absence of the defendant.

**A. KANIARU**

**JUDGE- ELC, EMBU**

**6/3/2024**

