



**Gichuri v Kigunda (Environment & Land Case 821 of 2015)
[2024] KEELC 6530 (KLR) (3 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6530 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 821 OF 2015
OA ANGOTE, J
OCTOBER 3, 2024**

BETWEEN

JOHN MAINA GICHURI PLAINTIFF

AND

PAUL GITHI KIGUNDA DEFENDANT

JUDGMENT

1. The Plaintiff has filed this suit through the Complaint dated 27th July 2015. His claim is premised on the sale agreement between himself and the Defendant, dated 16th January 2012 with respect to the suit property, known as Ngundu Farm Plot Number Block 26/201/9 measuring half an acre.
2. The Plaintiff avers that the parties had contracted that the Defendant/vendor would surrender all the necessary documents in his possession to facilitate the transfer of the suit property upon receipt of the purchase price, which was Kshs. 1,600,000.
3. According to the Plaintiff, on 16th January 2012, he remitted in cash the sum of Kshs. 100,000 to the Defendant on execution of the sale agreement and the Defendant acknowledged receipt and that on the same date, he deposited on the Defendant's account the sum of Kshs. 1,500,000 and the Defendant acknowledged receipt.
4. It is the Plaintiff's case that it was a further term of the contract that he was to take possession of the suit property upon payment of the entire purchase price and that despite receipt of the full purchase price, the Defendant has refused or neglected to transfer the suit property to him.
5. The Plaintiff prays for Judgment against the Defendant and seeks the following orders:
 - a. A declaration that the Plaintiff is entitled to half an acre over Ngundu Farm Plot No. 9 Block 26/201/9.



- b. An order for subdivision of Ngundu Farm Plot No. 9 Block 26/201/9 to create therefrom half an acre.
 - c. An order for the Defendant to sign consent and transfer forms in favour of the Plaintiff failure to which the Deputy Registrar do sign on his behalf.
 - d. Costs of this suit.
 - e. Any other relief this Honourable Court may deem fit to grant.
6. The Defendant has opposed the suit through his Defence dated 1st December 2017, in which he averred that he is a stranger to the property described in the Plaint as Ngundu Farm Plot Number Block 126/201/9. He asserts that he is the owner of Ngundu Farm Plot Number 126/ 201 which he has sub-divided into various portions, and that any orders issued with respect to Ngundu Farm Plot Number Block 126/201/9 would be unenforceable against him.
 7. The Defendant stated that he has not refused to transfer the property to any bona fide purchasers and that he is waiting for the processing of the Certificate of Lease for the property to pave way for transfer of respective portions to bona fide purchasers.

Hearing and evidence

8. The Plaintiff, PW1, adopted his statement dated 21st July 2015 as his evidence in chief. He testified that he entered into a sale agreement with the Defendant dated 16th January 2012; that he paid him Kshs. 100,00 in cash and deposited Kshs. 1,500,000 in the Defendant's account at Equity bank; that he proceeded to fence part of the suit property; that the Defendant was to give him the title after 6 months and that despite him pursuing the Lease, the Defendant did not give it to him and the property has not been transferred in his name.
9. PW1 denied the Defendant's claim that it is the lands office that had not issued him title. PW1 produced two bundles of documents dated 15th November 2017 and 27th July 2015, which included a copy of Paul Githi Kigunda's Identification Card and KRA PIN; a copy of the plot certificate issued by Kigunda Agencies to John Maina Gichuri with respect to parcel of land known as Nbi/ 126/201/9, dated 16th January 2012; a copy of the proposed sub-division certificate; a copy of the sale agreement dated 16th January 2012 and a demand letter dated 21st April 2015.
10. The Defendant did not testify.

Submissions

11. Counsel for the Plaintiff submitted that there is a valid agreement of sale dated 16th January 2012 which has been duly executed by both parties and witnessed by Thomas Kabaka Ombui, Advocate and that the agreement is in compliance with Section 3(3) of the *Law of Contract Act*.
12. Counsel submitted that damages would not be a suitable remedy in this case as the Plaintiff cannot possibly buy a similar sized property in the same location at the same price today and that the Plaintiff met the terms of the contract required of him, and is therefore entitled to the remedy of specific performance.
13. Counsel submitted that the Plaintiff paid the entire purchase price, which fact has not been rebutted, and that the Plaintiff took possession of the suit property as per the terms of the agreement and thus a constructive trust was created in his favour.



14. Counsel for the Plaintiff relied on the Court of Appeal case of Gharib Suleiman Gharib vs Abdulrahnan Mohammed Agil Civil Appeal No. 112 of 1998 on the guidelines for specific performance, and the case of Macharia Mwangi & 87 others vs Davidson Mwangi Kagiri [2014] eKLR.

Analysis and Determination

15. The Plaintiff's case herein is that he lawfully purchased the suit property, being Plot No. 9 of Ngundu Farm Plot Number Block 26/201/9 measuring half an acre from the Defendant through a sale agreement dated 16th January 2012 for Kshs. 1,600,000.
16. The Plaintiff asserts that despite payment of the purchase price, the Defendant has failed to give him the title documents and other completion documents duly signed in his favour and to transfer the suit property to him.
17. The Plaintiff has sought to be declared the lawful owner of the suit property and orders compelling the Defendant to execute the transfer documents. The Defendant in this case did not present any witness testimony or evidence to buttress his case, or controvert the Plaintiff's evidence.
18. The Defendant having failed to adduce evidence, his Defence remains mere allegations which can be relied upon by this court. In stating so, this court is guided by the case of North End Trading Company Limited (Carrying on The Business Under The Registered Name Of) Kenya Refuse Handlers Limited vs. City Council Of Nairobi (2019) eKLR where the court stated as follows:

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“ 18. In *Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schulter Civil Appeal No.23 of 1997*, it was held that where a Defendant does not adduce evidence the Plaintiff's evidence is to be believed, as allegations by the defence is not evidence.

19. In the case of *Motex Knitwear Limited Vs. Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No.834 of 2002*, Lesiit, J. citing the case of *Autar Singh Bahra And Another Vs. Raju Govindji, HCCC No.548 of 1998* appreciated that:-

‘Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the evidence rendered by the 1st Plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail.’

19. However, even where a suit is undefended or uncontroverted, the Plaintiff has a duty to formally prove his case on a balance of probabilities as is required by the law. In the case of *Gichinga Kibutha vs Caroline Nduku (2018) eKLR* 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.”

20. Before considering the merits of the suit, there is first the matter of the proper identification of the suit property. In his Defence, the Defendant indicated that he was the proprietor of Ngundu Farm Block 126/201 and not 26/201/9.



21. It is notable that in the Plot Certificate presented by the Plaintiff dated 12th January 2016, the Plot Number indicated there is Plot 9 Block 126/201. It therefore appears that the plot number was erroneously indicated in the sale agreement and in the Plaint filed herein as 26/201.
22. Was this error so material as to cause confusion as to the identity of the suit property? This court does not find so. This is especially considering that the documents submitted by the Plaintiff shows the correct plot number. The suit property is therefore Plot 9 of Block No. 126/201.
23. The Plaintiff in this case is seeking for the remedy of specific performance, compelling the Defendant to complete the terms of the sale agreement. Specific performance is a discretionary remedy which is based on the existence of a valid, enforceable contract. This was held in *Reliable Electrical Engineers (K) Ltd vs Mantrac Kenya Limited* [2006] eKLR where Maraga J (as he was then) stated as follows:

“Specific performance, like any other equitable remedy, is discretionary and the court will only grant it on the well settled 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 where 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 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.”

24. The Plaintiff has relied on the Court of Appeal’s similar finding in *Gharib Suleman Gharib vs Abdulrahman Mohamed Agil* LLR NO. 750 (CAK) Civil Appeal No. 112 of 1998, as quoted in *Edward Gitahi Kihia vs Thomas Caroll* [2020] eKLR which held 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.”

25. Therefore, specific performance is a remedy only granted when there is in existence a valid and enforceable contract and where damages would not be an adequate remedy. The elements of a valid contract are set out in Section 3 of the [Law of Contract Act](#) which provides as follows:

“No suit shall be brought upon a contract for the disposition of an interest in land unless-

- (a) the contract on which the suit is founded –
 - (i) is in writing.
 - (ii) is signed by all parties thereto; an
- (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party.”

26. The Plaintiff pleaded and testified that he entered into a sale agreement with the Defendant over a portion of half an acre of land. He produced as his evidence an agreement made on 16th January, 2012.



27. A perusal of the agreement reveals that it was in respect of Ngundu Farm Block 26/201/9 and was made between Mr. Paul Githi Kigunda and Mr. John Maina Gichuri who are the Defendant and Plaintiff herein respectively. The agreement was signed by both of them, and their signatures witnessed by Peter Kabiru Githinji and Francis Githinji Gichuri respectively. This court is persuaded that there was a valid contract subsisting between the Plaintiff and the Defendant.
28. Courts have held that a party seeking an order for specific performance must show that he has performed his end of the bargain or is ready and willing to do so. This was held in *Sisto Wambugu vs Kamau Njuguna* (1983) eKLR, where the court observed as follows;
- “In my judgment the respondent cannot come to the court and obtain an order of the transfer of the land, as he sought in his counterclaim, which is in effect an order of specific performance of the agreement, unless he had performed his part of the bargain or can show that he was at all times ready and willing to do so.”
29. The Plaintiff has claimed that it bought the suit property from the Defendant and duly paid Kshs. 1,600,000 to the Defendant. The Defendant did not deny receipt of the said payment and has made no claim for any payment. This court is persuaded that the Plaintiff indeed met his contractual obligations.
30. This court is therefore satisfied that the Plaintiff has established grounds to be granted orders of specific performance. The Plaintiff’s suit is consequently merited and the following orders do hereby issue:
- a. A declaration be and is hereby issued that the Plaintiff is entitled to half an acre of Ngundu Farm Plot No. 9 Block 26/201/9.
 - b. An order for subdivision of Ngundu Farm Plot No. 9 Block 26/201/9 by the Defendant within 30 days to create therefrom half an acre to be transferred to the Plaintiff is hereby issued.
 - c. An order for the Defendant to sign completion documents in favour of the Plaintiff within 30 days, failure to which the Deputy Registrar will sign on his behalf, is hereby issued.
 - d. Costs of this suit to be borne by the Defendant.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 3RD DAY OF OCTOBER, 2024.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Kemboi for Plaintiff

No appearance for Defendant

Court Assistant - Tracy

