



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Waweru v Kamau (Land Case E223 of 2023)
[2024] KEELC 6899 (KLR) (17 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6899 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
LAND CASE E223 OF 2023
MD MWANGI, J
OCTOBER 17, 2024**

BETWEEN

MARTHA WAMBUI WAWERU PLAINTIFF

AND

BEDAN MUROKI KAMAU DEFENDANT

JUDGMENT

Background

1. The Plaintiff in this case, in her plaint dated 20th December 2023 alleges that she had entered into an agreement with the Defendant on 13th October 2017. The subject matter of the agreement was a parcel of land described as plot No. 6 within Laikipia, Daiga Umande Block 2/5261 (Akorino) measuring approximately 0.045 hectares.
2. The Plaintiff purchased the subject property from the Defendant for a sum of Kshs. 300,000/-. The completion date was 12th April, 2018.
3. The Plaintiff avers that she performed her obligations under the agreement for sale by paying the full purchase. The Defendant, however, and despite repeated requests and a formal completion notice by the Plaintiff, has failed and refused to complete the transaction, necessitating the filing of this suit.
4. The Plaintiff prays for an order of specific performance of the agreement of 13th October 2017 or alternatively, damages for breach of the agreement with costs and interests.

Evidence Adduced.

5. This case proceeded to hearing as an undefended suit in terms of the provisions of the provisions of Order 10 rule 9 of the Civil Procedure Rules; the Defendant having been duly served but failed to enter appearance and or file a statement of defence against the Plaintiff's claim.



6. The Plaintiff testified as the sole witness in her case. She adopted as her evidence in chief, the witness statement dated 20th December 2023. She further produced the documents on her list of documents of even date as exhibits in support of her case. The documents included the agreement, the letter of offer dated 13th October, 2017 and copies of the receipts issued confirming payment of the purchase price and the completion notice. The court was shown and confirmed the originals.

Issues for Determination.

7. Having considered the pleadings filed in this case and the evidence adduced at the hearing of the case, the issues for determination are:-
 - a. whether the Plaintiff's case is merited; and
 - b. What orders is the Plaintiff entitled to?

Determination.

8. The agreement between the Plaintiff and the Defendant dated 13th October, 2017 confirms that the agreed consideration for the sale of the plot No. 6 was Kshs. 300,000/-. It is apparent that the plot No. 6 was to be excised from the parcel of land known as Laikipia, Daiga Umande/Block 2/5261 (Akorino). The vendor was required to point out to the Plaintiff the boundaries and beacons before the completion date. Essentially, the vendor was supposed to have completed the excision of plot No. 6 from the main title and obtained the freehold title for it.
9. The completion date was expressed to be 180 days from the date of execution of the agreement. Seven (7) years later, the vendor was yet to complete the sale in spite of the notice of completion issued by the Plaintiff to him.
10. Consequently, the court finds and holds that the Defendant is in breach of the agreement.
11. The agreement contained a default clause which was clause 6.2 thereof. The consequences of breach on the part of the vendor after the issuance of a completion notice was that the purchaser was, at her own absolute discretion entitled to;
 - a. extend the time for completion; or
 - b. rescind the agreement, or
 - c. immediately demand and require a full refund of the deposit.
12. The Plaintiff who was the purchaser issued a completion notice to the Defendant which was not complied with having on her part fully performed her obligations under the contract. She prays for an order of specific performance of the agreement with an alternative prayer for damages for breach of agreement.
13. The dilemma that confronts the court in this kind of situation is whether the remedy of specific performance is available in a case where the subject parcel of land is not specifically and uniquely identifiable. That is the position in this case since the plot No. 6 was to be excised from a bigger parcel of land. The Plaintiff did not present to the court a subdivision plan identifying the specific location of the plot No. 6 on the bigger parcel of land. There is also no evidence presented before the Court to confirm that the plot has not been excised from the main title.



14. Specific performance as defined in the Black’s Law Dictionary 11th Edition is,

“an equitable remedy that lies within the court’s discretion to award whenever the common law remedy is insufficient, either because damages would be inadequate or because the damages could not possibly be established.”
15. The court must in determining whether to award the remedy of specific performance consider each case on its own merits. The practicality of enforcing an order of specific performance must be one such consideration.
16. In the instant case, the grant of an order of specific performance is inappropriate. I say so because, while enforcing the order may not be impossible, it will definitely be cumbersome and costly in view of the fact that it must begin with the excision of the plot from the main title which is subject to many limitations including the grant of the consent by the land control board in case of agricultural land and other approvals from the relevant authorities. Granting the order of specific performance may indeed lead to an undesirable or absurd outcome.
17. The overriding objective enjoins the courts to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.
18. In the circumstances of this case, I don’t consider the award of an order of specific performance appropriate. It will not be furthering the overriding objective. I will instead award the Plaintiff damages for breach of contract which are easily establishable in this case and adequate for that matter.
19. In the case of Barclays Bank of Kenya Ltd versus MEMA (2021) KEHC 333 (KLR) Majanja, J (as he then was) observed that the purpose of damages for breach of contract is subject to mitigation of loss to put the possible claimant in as much as possible in the same position he would have been if the breach complained of had not occurred. The principle is encapsulated in the Latin maxim ‘restitution in integrum’.
20. The learned Judge in the above case cited with approval the decisions in the case of K.I.E Ltd –vs- Lee Enterprises Ltd (2009) eKLR and Kenya Breweries Ltd versus Natex Distributors Ltd (2004) eKLR where the courts held that;

“...the measure of damages is in accordance with the rule established in the case of Hadley –vs- Baxendale (1854) 9 Exh. 341 that the measure of damages is such as may fairly and reasonably be considered arising naturally from the breach itself or such as may fairly and reasonably be considered arising naturally from the breach itself or such as may be reasonably contemplated by the parties at the time the contract was made and a probable result of such breach.”
21. In this instance and as already highlighted, the parties in their agreement had provided for refund of monies paid to the Vendor by the Purchaser in case of breach by the Vendor.
22. The Plaintiff who was the purchaser in the agreement the subject matter of this suit has proved that she paid the entire amount of Kshs. 300,000/- to the vendor. The last installment of Kshs. 190,000 was paid on the 1st March 2018.
23. Accordingly, I award the Plaintiff damages for breach of contract against the Defendant being the sum of Kshs. 300,000/- paid to the Defendant as consideration. The said sum of Kshs. 300,000/- will attract interest from the date of filing this suit until it is paid in full at court rates.



24. I further award the Plaintiff the costs of this suit which shall however, be assessed on the scale applicable for matters filed in the Magistrates' courts considering the value of the subject matter was within the pecuniary jurisdiction of the Magistrates' courts.
25. The conclusion therefore is that the Plaintiff's case against the Defendant succeeds. The Plaintiff is awarded damages of Kshs. 300,000/- with interest at court rates from the date of filing suit until payment in full. The Plaintiff shall also have the costs of the suit to be assessed at the scale applicable for matters filed in the Magistrates' courts.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF OCTOBER, 2024.

M.D. MWANGI

JUDGE

In the virtual presence of:

Martha Wambui, the Plaintiff in person

N/A by the Defendant

Court Assistant: Yvette

M.D. MWANGI

JUDGE

