



Thuo v Ngugi; Cresswell, Mann & DOD Advocates & another (Interested Parties) (Environment & Land Case E86 of 2021) [2023] KEELC 20626 (KLR) (5 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20626 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE E86 OF 2021
A OMBWAYO, J
OCTOBER 5, 2023**

BETWEEN

JOHN MWAURA THUO PLAINTIFF

AND

DICKSON NGIGI NGUGI DEFENDANT

AND

CRESSWELL, MANN & DOD ADVOCATES INTERESTED PARTY

MOHAMMED & KINYANJUI ADVOCATES INTERESTED PARTY

JUDGMENT

Introduction

1. The Plaintiff commenced this suit vide a plaint dated 30th November, 2021 and stated that the Plaintiff and Defendant entered into an agreement for sale of the suit property L.R No. 519/353 to the Plaintiff. The Plaintiff sought for judgment to be entered against the Defendant as follows:
 - a. A declaration that the Plaintiff is the owner of the property having paid the agreed Purchase price in full.
 - b. An order for the Specific performance of the contract by the Defendant by compelling him to execute a fresh set of transfer documents in compliance with the 2012 Land Laws and furnishing the plaintiff with all required completion documents in his possession.
 - c. In the alternative, in the event that the Defendant fails to execute the documents within thirty (30) days of the judgment, the Registrar of Lands/ the Lands office do execute the transfer in favour of the plaintiff.



- d. The firms of Cresswell, Mann and Dod Advocates and Mohamed and Kinyanjui Advocates be released from their respective professional undertakings and be compelled to release
- e) The Costs of this suit be borne by the Defendant. the documents in their possession to the Plaintiff or his order;

The Defendant herein entered appearance but failed to file his Defence. The 1st interested party filed its Defence and Counter claim and prayed for the following orders:

- a. The court terminates professional undertaking entered between the 1st & 2nd interested parties herein and determine to whom the security documents should be released to.
- b. A declaration that the Plaintiff is entitled to be paid professional respective parties within 30 days failure of which the same be taxed by the Deputy Registrar/Taxing officer as provided under the Advocates Remuneration Order. legal fees for services rendered. The same to be agreed between the
- c. Costs of this suit and counter-claim.
- d. Any other relief this Honourable court deems fit to grant.

Plaintiff's Case

2. John Mwaura Thuo the Plaintiff herein testified as PW1 where he produced his statement filed on 8/12/2021 and bundle of documents was admitted as his evidence and marked PEX 1- PEX 18 and PEX 19-PEX 88. PW1 stated he knew the Defendant in 2007. He stated that he intended to purchase 20 acres from the Defendant. He testified that he paid the money in installments as per the agreement after which the Defendant wrote to the advocate and stating that he had not understood the agreement. He further testified that during the transaction they were using one advocate but he later got his own. It was his testimony that the Defendant was reluctant to proceed with the sale and he wrote to his advocate rescinding the agreement. He testified that in 2016 he paid the 10,000,000 and after which the bank declined to grant him the documents. It was his testimony that he paid Kshs 35,000,000 thus fulfilling his obligation having made the final payment in 2016.
3. He testified that he had done a request to bank but that the delay was caused by the Defendant. He added that he had been utilizing the suit property and further that the Defendant refused to give consent to the charge but he gave them the consent to transfer.
4. He stated that he paid stamp duty and that the documents are with the advocates. He prayed for damages and costs and for the Defendant to pay damages.
5. On cross examination, he confirmed that he had bought the suit land and was not renting it for Kshs. 100,000. He further confirmed that he bought 20 acres for Kshs. 35,000,000/=
6. On re examination, he stated that he had 3 agreements which they all signed.

This marked the close of the Plaintiff's case.

Defendant's Case

7. Dickson Ngigi Ngugi, the Defendant herein testified that he is a farmer in Njoror town and that he needed to sell 10 acres for his children's school fees. He testified that he owned 300 acres allocated to him by the Government in 1977. He testified that he paid for the land despite resistance by the local



administration. He further testified that in 1982 Egerton University had wanted to take 50 acres of the land and ordered that the same be subdivided.

8. It was his testimony that in 1984 he was left with 50 acres and was issued with a letter of allotment. He added that he paid for 50 acres and that the Plaintiff requested him to sell the land after which he was given 10 acres by the colonel of land. He testified that the Plaintiff bought the suit land but never completed paying which was Kshs. 380,000 per acre.
9. He testified that he had spent over Ksh400,000 trying to get a surveyor who surveyed the land into the portion 20 acres and 30 acres and later the Plaintiff requested for the other 30 acres so as to put up a University college. He stated that during the agreement, the Plaintiff said that Kshs. 400,000 was to be captured in the agreement but he was still to pay Kshs20,000 without being included in the agreement and that the price of 20 acres and 30 acres was amalgamated to 50 acres.
10. He testified that Kenol Kobil offered him a petrol station and requested him to deposit 6,000,000 and he asked the Plaintiff to pay him the balance of Kshs. 6,000,000 but since he didn't have the money, he decided to borrow 6,000,000 from Barclays bank. It was his testimony that the Plaintiff did not allow him to use the title as security for the loan and this resulted in the Plaintiff placing a restriction on the title at Lands.
11. He testified that he is the owner of the suit land and the Plaintiff is only a tenant. He added that Justice Mutunga acknowledged that he was the owner of the land and that the Plaintiff was to pay 10% of the amount. He further testified that the Plaintiff has since defaulted in payment of rent and he owes him Kshs.15,000,000/=.
12. It was his testimony that they had agreed that the agreement would be valid for 3 months and that the Plaintiff was to pay him Kshs. 1,000,000 yet he wanted to claim adverse possession.
13. He urged the court to protect his land and added that he had not sold the suit land to the Plaintiff.
14. He testified that he should pay 700,000 plus 1.2 million plus 3.5 million since he had refunded his money so there is no claim against him.

That marked the close of the Defendant's case.

Plaintiff's Submissions

15. The Plaintiff filed his submissions dated 9th March, 2023 on 10th March, 2023 where he gave a summary of both the Plaintiff and Defendant's evidence and identified five issues for determination. One, Whether the Plaintiff having paid the entire consideration becomes the beneficial owner of L.R No. 519/353 the suit property herein. He relied on Section 3 (3) of the *Law of Contract Act* and the case of Joseph Kangethe Irungu V Peter Nganga Muchoki [2018] eKLR. He submitted that he produced three sale agreements which the Defendant consciously agreed to and admitted to executing and therefore he was bound by its contents.
16. The second issue is whether the Defendant is legally bound to specifically perform the agreement and whether the Plaintiff is entitled to delivery of all completion documents regarding the suit property. He cited the Court of Appeal case of Mbeetu V Kirima Environment and Land Appeal No. 116 of 2019) [2022] KEELC 2369 (KLR) and submitted that the Defendant does not dispute receiving the payment of Kshs. 20,000,000 and argued that the Defendant is legally bound to specifically perform his obligations.
17. The third issue is whether the Plaintiff is entitled to delivery of all completion documents regarding the suit property. The Plaintiff submitted that it is only right that the Plaintiff who has suffered loss



be entitled to delivery of fresh transfer documents. The fourth issue is whether the transfer of the suit property should be effected. He submitted that the principle of sanctity of a contract stipulates that parties to a contract must honour their obligations under the contract binding the parties.

18. The fifth issue is who ought to bear the costs of the suit. The Plaintiff submitted that he ought to be granted costs since the Defendant violated his contractual obligations.

Defendant's Submissions

19. The Defendant filed his submissions dated 20th June, 2023 and submitted that the suit herein arises from a contract for the purchase and sale of the suit property entered into by the Plaintiff and the Defendant and which kept on being extended on various dates with the final agreement being entered into on the 16th March, 2012. He submitted that it is not in dispute that there was a sale agreement over the suit parcel of land as envisaged under Section 3 (3) of the Law of Contract Act.
20. The Defendant submitted that it is also not in dispute that a deposit of Ksh 20,000,000 (Twenty million) had been paid to the vendor as at the time of the agreement. He submitted that the dispute is over the balance of Ksh 15,000,000 which ought to have been paid as at the completion date of 30th June 2012 as per clause 4 of the sale agreement between the parties. He submitted that clause 4.1 states that; "Completion of sale and purchase and execution of the Transfer shall take place on or before 30th June 2012."
21. It is the Defendants submission that the Plaintiff had earlier filed a suit under Originating Summons seeking the same remedies in the plaint herein. The Defendant submitted that the court in its Judgment dated the 30th September, 2021 in John Mwaura Thuo V Dickson Ngugi; Creswell, Mann & Dod Advocates & another (Interested parties) [2021] Eklr (Nakuru ELC no 187 of 2017) advised the Plaintiff to move the court by way of Plaint for determination of the issues raised in the originating summons. He submits that the Court in its judgment did acknowledge that the Plaintiff had only paid a sum of Ksh 20,000,000. He quoted the instructive paragraphs which are 13, 14, 15, 16 and 17.
22. The Defendant submitted that he took the position in the above mentioned paragraphs in his oral evidence tendered in court and the Defendant indicated that he never received the said Ksh 15,000,000 from the Plaintiff and that the Plaintiff breached the contract for sale.
23. The Defendant submitted that the Black's Law Dictionary, 9th Edition, Page 213, defines a breach of Contract as;

"a violation of a contractual obligation by failing to perform one's own promise, by repudiating it, or by interfering with another party's performance. A breach may be one by non-performance or by repudiation or by both. Every breach gives rise to a claim for damages and may give rise to other remedies. Even if the injured party sustains no pecuniary loss, or is unable to show such loss, with sufficient certainty, he has at least a claim for nominal damages."
24. It is the Defendant's submission that the sale and agreement in the suit herein ought to have been completed by the 30th June 2012 and anything beyond that was out of the agreement thus the failure to complete by the 30th June 2012 was a breach by the plaintiff.
25. The Defendant submitted that the Plaintiff in his Plaint alleged to have paid the full purchase price and a perusal of his list of documents showed that he allegedly paid the sum of Ksh 5,000,000 to the Defendant on the 19th September 2012 while a second amount of Ksh 10,000,000/= was paid on the 6th January 2016. He submitted that both of these transactions were made after the completion date with



- the second payment being made a clear four years after the contract had lapsed. He further submitted that the Defendant in his oral defense clearly denied receiving these monies.
26. The Defendant relied on the judicial authorities of *Joseph Kangethe Irungu v Peter Ng'ang'a Muchoki* [2018] eKLR, *Rufale Vs Umon Manufacturing Co (Ramsboltom)* (1918) L.R 1KB 592 and *Attorney General of Belize et al Vs Belize Telecom Ltd & Another* (2009) I WLR 1980 at page 1993, citing Lord Person in *Trollope Colls Ltd Vs North West Metropolitan Regional Hospital Board* (1973) I WLR 601 at 609.
 27. It is the Defendant's submission that the contract as entered into by the parties ceased to be operational on the 30th June 2012 when the Plaintiff did not meet his end of the obligation by completing payments. He further submitted that there was no extension of the time for completion sought by the Plaintiff who had already entered into the suit property and was fully utilizing it to date.
 28. He submitted that having breached the contract for the sale and purchase of the suit property, the Plaintiff is not entitled to the orders sought for in this Honourable court and the fact that there was correspondence on the breach from the Defendant to the Plaintiff shows that the Plaintiff was well aware of the breach but sought no extension of contract to remedy the same.
 29. He submitted that he instead tried to steal a match against the Defendant by waiting until 12 years were about to lapse before bringing this suit, probably in the hope of claiming adverse possession should his suit against the Defendant lapse. The Defendant submitted that the Plaintiff has approached the Court with unclean hands and his prayers should not be allowed.
 30. The Defendant also submitted that the Defendant in his oral evidence went further to seek for the payment of damages as a result of the actions of the Plaintiff who denied him beneficial use of the suit property despite having breached the contract between them. He submitted that the Plaintiff has been earning profit from the suit property to the detriment of the Defendant and it was his prayers that the Plaintiff vacates the property and pays him for the damages he has incurred at current lease rates for all the time that he has been utilizing the suit property.
 31. The Defendant quoted clause 10 (1) of the Sale Agreement between the parties dated 16th March 2012. The Defendant submitted that the Plaintiff failed to prove that he paid the balance of the purchase price within the stipulated time under the agreement or at all and thus his claim against him has failed. He submitted that the suit against the Defendant ought to be dismissed with costs and the firms of Cresswell, Mann and Dod and Mohamed and Kinyanjui advocates be ordered to release the completion documents to the Defendant.

Analysis and Determination

32. I have considered the pleadings, the evidence on record and the submissions by the parties and I am of the view that the following issues need to be determined:
 - a. Whether there is breach of contract by the Plaintiff of the sale agreement.
 - b. Whether the Plaintiff is entitled to an order of Specific Performance as prayed.
 - c. Who should bear the costs of the suit.
33. The Court has carefully perused the sale agreements produced as Exhibit by the Plaintiff and noted that the same is in writing and is signed by the parties. It thus met the requirements of Section 3(3) of the Contract Act. Further the agreement for sale contains the names of the parties, the description of the property, the purchase price and the conditions thereto. A further look at the said sale agreements confirms that the same is a valid sale agreement which is enforceable by the parties



34. The Sale agreement having met all the requirements between the Plaintiff and the Defendant and therefore the sale agreement between the two is valid and it thus met the requirements of Section 3(3) of Contract Act. It then follows that the Court must further interrogate whether there was breach of the said Contract. Blacks Law Dictionary, 9th Edition, page 213 defines a breach of Contract as;

“a violation of a contractual obligation by failing to perform one’s own promised, by repudiating, or by interfering with another parties performance. A breach may be one by non-performance or by repudiation or both. Every breach gives rise to a claim for damages and may give rise to other remedies. Even if the injured party sustains no pecuniary loss or unable to show such loss with sufficient certainty he has at least a claim for nominal damages”

35. It is not in dispute that there were three contracts of sale for the suit properties both the Plaintiff and Defendant executed. This court notes that the consideration as per the said agreements were done however in installments. The Plaintiff claims that he paid the entire full consideration of Kshs. 35,000,000 but the Defendant contends that the Plaintiff breached his obligation to the contract by not paying Kshs. 15,000,000. Further, the Defendant contends that the Plaintiff paid part of the purchase price after the completion date about four years after the execution of the sale agreement thereby breaching his obligation to the contract.

36. It is noteworthy that all the installments were paid to the Defendant who received and despite the Defendant claiming that he had refunded part of the monies, there is no evidence to prove the same. It is not in dispute that the Plaintiff paid the last installment after the completion date however, it is this court’s view that the same created an implied contract by conduct as the Defendant received the payment after the completion date as evidenced by the bank receipts. It is therefore implied that the conduct by the Defendant of receiving the balance of the purchase price even after lapse of the completion date confirmed that the agreement was still in force.

37. In view of the foregoing, it is my view that even though it was term of the contract that the same be completed within three months, the Plaintiff having paid the balance and the same being received by the Defendant did not amount to any breach of the contract by the Plaintiff.

38. On the second issue for determination, it is important to note that granting an order of Specific Performance is discretionary and as such this court in making a determination on whether or not to grant the same ought to look at the merits of the case based on a case to case basis and whether there is an adequate alternative. In the case of Reliable Electrical Engineers Ltd.....Vs....Mantrac Kenya Limited (2006) eKLR, Justice Maraga (as he then was) 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.”



39. In the sale agreement presented before this Honourable Court, the Defendant is the owner of the suit property. It is clear that the Defendant is yet to transfer the suit property to the Plaintiff despite the purchase price having been completed. It is also not in dispute that the Plaintiff is in occupation of the suit property. In that regard, this court grants an order of Specific Performance compelling the Defendant to sign the transfer forms and further deliver completion documents to the Plaintiff.
40. This court also notes that the 1st interested party filed its Defence and Counter claim, however, the same cannot hold any water at this point since the 1st interested party is not a principal party to the suit. This court is limited to interrogate the issues presented by the Plaintiff and Defendant. In the Supreme Court case of Francis Kariuki Muruatetu & another v Republic & 5 others [2016] eKLR the court held as follows:

“...any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the primary/principal parties’ before the Court. The determination of any matter will always have a direct effect on the primary/principal parties. Third parties admitted as interested parties may only be remotely or indirectly affected, but the primary impact is on the parties that first moved the Court. This is true, more so, in proceedings that were not commenced as Public Interest Litigation (PIL), like the proceedings now before us.

(42) Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. An interested party may not frame its own fresh issues, or introduce new issues for determination by the Court. One of the principles for admission of an interested party is that such a party must demonstrate that he/she has a stake in the matter before the Court. That stake cannot take the form of an altogether a new issue to be introduced before the Court.”

41. The Defendant also failed to file any Defence or Counter claim and this court’s decision is thus limited to the Plaintiff’s documents as filed and the testimonies.
- 42.. Having then carefully considered the available evidence, this court finds that the Plaintiff has proved his case on the required standard of balance of probabilities.
- 43.. Consequently, the Court enters Judgment for the Plaintiff against the Defendant in the following terms:-
- a. The Plaintiff is the owner of the suit property L.R No. 519/353
 - b. An order for Specific performance is hereby granted compelling the Defendant to execute a fresh set of transfer documents and furnishing the Plaintiff with all required completion documents in his possession.
 - c. In the alternative, in the event that the Defendant fails to execute the documents within thirty (30) days of the judgment, the Registrar of Lands/ the Lands office do execute the transfer in favour of the Plaintiff.
 - d. The Plaintiff is awarded costs of the suit and interest at courts rate from the date of filing of this suit until the date of payment in full



JUDGMENT READ, SIGNED AND DATED AT NAKURU THIS 5TH DAY OF OCTOBER 2023.

A.O. OMBWAYO

JUDGE

