



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA
AT MALINDI
ELC NO. 93 OF 2015

MAGRETVILLE ASAMI MACHIO1ST PLAINTIFF

GRIGORIOS SMARAGDIS2ND PLAINTIFF

VERSUS

MUSA MWERA ATHUMAN 1ST DEFENDANT

TRUPHENA NYABOKE ONWONG'A 2ND DEFENDANT

YOBESH ONWONG'A OYARO 3RD DEFENDANT

JUDGMENT

By an Amended Plaint dated 1st December 2017, the Plaintiffs herein sued the Defendants jointly and severally seeking for the following orders: -

- a. An order revoking the title deed issued to the 2nd and 3rd Defendants in respect to parcel of land known as title Number Kilifi/Mtwapa/1496 and an order directing the District Land Registrar, Kilifi District Land Registry to cancel the entries number 4 and 5 on the register of the Title Number Kilifi/Mtwapa/1496.
- b. An order of specific performance to compel the 1st Defendant to comply with the Agreement of Sale dated 10th July 2009 and execute all relevant documents to effect transfer of title Number Kilifi/Mtwapa/1496 in favour of 1st Plaintiff herein and if the 1st Defendant's fails to execute the transfer in favour of the 1st Plaintiff herein within 14 days of this order, the Deputy Registrar of this Honourable Court be and is hereby ordered to execute transfer and all relevant documents to effect transfer in favour of the 1st Plaintiff herein.
- c. An order of permanent injunction to restrain the Defendants from wasting, damaging, alienation, sale, removal, disposition, taking possession or dealing in any manner with the parcel of land known Title Number Kilifi/Mtwapa/1496 except transferring the property to the Plaintiffs herein.
- d. In alternative to orders a, b, and c above, the 1st Defendant be and is hereby ordered to;
 - i. Refund deposit of the purchase price of Kshs. 572, 000/- to the Plaintiffs together with interest at court rates from 10th July 2009 being the date of the agreement until the same is paid in full;
 - ii. Loss of investment and profits being equivalent of the current value of the suit property being the sum of Kshs. 6,000,000/- as per valuation report.
- e. The costs of this suit.
- f. Such further or other reliefs as this Honourable court may deem appropriate.

PLAINTIFF'S CASE

PW1 adopted her statement and stated that the 1st Defendant was the registered owner of the land parcel Title No. Kilifi/Mtwapa/1496 whereby she entered into a Sale Agreement 10th July 2009, to sell the suit property at a consideration of Kshs. 900,000/-.

It was PW1's evidence that before execution of the said agreement, she paid to the 1st Defendant a deposit of Kshs. 300,000/ and a further Kshs. 50,000/-, Kshs. 22,000/- 200,000/- on 22nd November 2010, 22nd September 2011 and 15th December 2011 respectively making a total of Kshs. 572,000/-.

PW1 testified that the 1st Defendant was to obtain all the completion documents within 90 days but failed to do so until 12th March 2014 when the Defendant informed her that he could not register the transfer in favour of the Plaintiffs since his family members objected the sale. Notably, the 1st Defendant had obtained consent from the Land Control Board (LCB) on 12th January 2010.

PW1 further stated that the 1st Defendant, during the pendency of this suit, fraudulently transferred the suit property to the 2nd and 3rd Defendants on 29th April 2014, despite this court having issued an order of inhibition which was registered on 17th April 2014.

PW1 produced a bundle of documents in support of her case and urged the court to grant the prayers as per the plaint with costs

PLAINTIFF'S SUBMISSIONS

Counsel submitted on a single issue as to whether the Plaintiffs are entitled to an order of specific performance and relied on the cases of **Andrew Karemi Kingori v Joseph Waweru Njoroge [2018] eKLR** and **Godfrey Ngatia Njoroge v James Ndungu Mungai [2019] eKLR** where the court held that the underlying principle in granting the equitable relief of specific performance is that the Plaintiff must show that he has performed all the terms of the contract which he has undertaken to perform whether expressly or by implication, and which he ought to have performed at the date of the writ in the action.

Counsel further submitted that the Sale Agreement was in writing, signed and attested to and that the Plaintiffs also paid the requisite stamp duty on the Sale Agreement, therefore the Sale Agreement was valid and enforceable having met the requirements under section 3(3) of the Law of Contract Act.

Counsel therefore urged the court to grant an order of specific performance as the Plaintiff had fulfilled part of the bargain and was not vitiated by any illegality.

ANALYSIS AND DETERMINATION

The issues for determination are as to whether the Sale Agreement dated 10th July 2009 is enforceable and whether the Plaintiffs are entitled to an order of specific performance. The 1st Defendant filed a defence but did not tender any evidence during the hearing of this case. Similarly, the 2nd and 3rd Defendants were served with summons but neither entered appearance nor filed any defence.

On the first issue whether the Sale Agreement dated 10th July 2009 is enforceable, the Sale Agreement which was produced as an exhibit provided for a 90 day for completion. Clause 6 provided as follows:

“The Vendor shall before the completion date obtain the necessary consents from relevant LCB at his own expense authorizing this sale and until such a consent is obtained no release of any part of the purchase price shall be authorized.”

The letter of consent from the Land Control Board is dated 12th January 2010 hence the completion date was to be 90 days from 12th January 2010 which is 12th April 2010. Clause 8 of the Agreement further provided that the balance of the purchase price was to be paid within 7 days from the date of successful transfer of the suit property.

It is not in dispute that the 1st Defendant entered into a Sale Agreement with the Plaintiffs and it is further not in dispute that the Plaintiffs paid part of the purchase price. From the Sale Agreement, it did not have an express clause on mode of termination or rescission of the agreement.

The Agreement just provided for the remedies available to either party in the event of default of the conditions of the agreement. The Sale Agreement however incorporated the Law Society Conditions of Sale (1989 Edition). Under Clause 4(7) of the Law Society of Kenya Conditions of Sale, a purchaser who is ready, able and willing to complete the sale and is aggrieved by the vendor's default to complete the contract within the completion period is required to issue a twenty-one days' notice requiring the purchaser to complete the contract. Clause 4(7) provides thus.

4(7) This sub-condition applies unless a special condition provides that time is of the essence in respect of the completion date:

a. In this condition “completion notice” means a notice served in accordance with this sub-condition;

b. If the sale shall not be completed on the completion date, either party (being then himself ready, able and willing to complete) may after that date serve on the other party notice to complete the transaction in accordance with this sub-condition. A party shall be deemed to be ready, able and willing to complete:

c.

d. Upon service of the completion notice it shall become a term of the contract that the transaction shall be completed within twenty-one (21) days of service and, in respect of such period, time shall be of the essence of the contract.

.....

g. Where, after service of a completion notice, the time for completion shall have been extended by agreement or implication, either party may again invoke the provisions of this condition which shall then take effect with the substitution of “ten (10) days” for “twenty-one (21) days” in paragraph (c) of this sub-condition.

From the evidence on record, the 1st Defendant issued a termination notice dated 12th March 2014, approximately two months after the Plaintiffs had issued a completion notice. It seems that the 1st Defendant had no intention of meeting his part of the bargain in the agreement which was valid.

On the issue as to whether the Plaintiffs are entitled to an order of specific performance, the court is guided by the case of **Reliable Electrical Engineers (K) Ltd v Mantrac Kenya Limited [2006] eKLR** where the court held that:

“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.”

The Plaintiffs admitted that they had not paid the full purchase price due to the fact that the Defendant reneged on the agreement. An order of specific performance is an equitable remedy where it is incumbent upon the Plaintiff to show that he/she has performed all the terms of the contract which he/she has undertaken to perform whether expressly or by implication, and which he/she ought to have performed at the date of the writ in the action.

The evidence by the Plaintiff indicates that by the time the agreement was terminated the Plaintiff had only paid Kshs. 572, 000/- which was acknowledged by the Defendant. The 1st Defendant had no intention of fulfilling his part of the bargain, that is why he went ahead and sold the suit land to the 2nd and 3rd Defendants while the matter was pending in court. The 1st Defendant also disregarded the court order that had issued an inhibition on the suit land with impunity.

The remedy that is available to the Plaintiffs are for refund as they did not meet the threshold for grant of an order of specific performance since they did not pay the full purchase price. This is because they were prevented to do so by the 1st Defendant who in his defence had admitted that the family had reneged of selling the suit land. It should be noted that there was a Land Control Board Consent issued in 2010. At what time did things change?

These are the Kenyans who enter into Sale Agreements with a sole purpose of taking the purchase price to sort out their immediate money needs with no intention of transferring the land then coming up with excuses that the spouse of the family have refused to consent to the sale.

I find that the Plaintiff is entitled to a refund of the purchase price of Kshs 572,000/ with interests at court rates from 10th July 2009 until payment in full plus costs of the suit. The Plaintiff is also entitled to general damages of Kshs 4000,0000/ having produced a Valuation Report on the same.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 2ND DAY OF FEBRUARY, 2022

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.