



**Mburu v Theuri; Kachili (Interested Party) (Environment & Land
Case 564 of 2017) [2022] KEELC 86 (KLR) (5 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 86 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 564 OF 2017**

**JG KEMEI, J
MAY 5, 2022**

BETWEEN

EUNICE WAMBUI MBURU PLAINTIFF

AND

JAMES WAGURA THEURI DEFENDANT

AND

ALLEN NGUTA KACHILI INTERESTED PARTY

JUDGMENT

1. Vide a further amended Plaint dated 10/5/2019, the Plaintiff through her Advocates M/S Gikenye Mugo & Rienye Advocates interalia prayed for Judgement against the Defendant for a mandatory injunction compelling the Defendant to cease from interfering with LR. RUiru Kiu Block 2/7349 and the Plaintiff's dealings with her financier, Equity Bank Limited. The gist of the Plaintiff's case was that she entered into a sale agreement for sale of L.R No. Ruiru Kiu Block 2/7439 (the suit land) to the Defendant for Kshs. 4,000,000/- including a deposit of Kshs. 2M. That the Defendant on diverse paid the balance but for Kshs. 300,000/- hence defaulting on the agreement to pay up on or before February 2017. That the title deed had been used as collateral to obtain a loan facility from Equity Bank, a fact disclosed to the Defendant who nevertheless wrote to the Bank on 16/3/2017 demanding for the release of title deed.
2. That due to the default, the Plaintiff wished to rescind the sale agreement and refund the Defendant his monies. Further that the Land control board consent was not obtained rendering the transaction void ab initio hence the suit.
3. In his defence, the Defendant filed an amended statement of defence and Counter claim dated 16/2/2018 through the firm of Mukiri Global Advocates LLP. He contended that he has always been willing, ready and able to pay the balance of Kshs. 300,000/- but the Plaintiff has been unable to



- complete the sale agreement. Conceding the Plaintiff's loan with Equity Bank, the Defendant averred that Plaintiff had not offset the balance of the loan despite the fact the deposit of Kshs. 2M was to be channeled to the Bank. That the bone of contention arose when the Plaintiff sought to apply for a second loan against the suit land title against the Defendant's wishes hence his move to write to the Bank to express his reservations.
4. In his Counterclaim, the Defendant accused the Plaintiff for failing to complete the contract and in particular the imposed contractual obligation on the Plaintiff to obtain relevant consents after execution of the sale agreement dated 18/7/2016. Notably that the Plaintiff's failure to obtain the Land control Board consent was in bad faith and intended to circumvent the course of justice and such failure should not relieve her from her obligation under the Agreement. To that end, the Defendant prayed for dismissal of the Plaintiff's suit and further for an order of Specific performance to direct the Plaintiff to transfer the suit land free from any encumbrances to him; General damages for breach of contract; costs of the Counterclaim and interests thereon.
 5. The matter was set down for pre-trial conferences on diverse dates; 25/7/2019, 19/11/2019 and hearing on 25/5/2020. Due to Covid-19 pandemic the suit was not heard as scheduled and later hearing was slated for 8/11/2021. Despite service of the hearing date on the Plaintiff's Counsel as evidenced by Affidavit of Service dated 24/5/2021 sworn by Johnevans Omondi Omenda, there was no personal or legal appearance on her behalf. Accordingly, the Defendant applied for the Plaintiff's case to be dismissed with costs to the Defendant and the Counterclaim was heard ex parte. The Interested Party, who is the Plaintiffs husband, was also absent on the hearing day.
 6. The Defendant James Wagura Theuri (DW1), testified as the sole witness in support of the Counterclaim. He adopted his witness statement dated 28/6/2017 as his evidence in chief. It was his evidence that on 18/7/2016, he entered into a sale agreement to buy the suit land from the Plaintiff herein for Kshs. 4M. That the Plaintiff had informed him that the suit land was charged to Equity Bank as collateral for a loan advanced to her and they agreed that the purchase price would be used to offset the loan facility for the original title deed to be released to the Defendant. That it was a term of the agreement inter alia that the deposit of Kshs. 2M would be paid to the Plaintiff prior to the execution of the sale agreement which is admitted. That he made payments as follows; Kshs. 200,000/- on 24/10/2016, Kshs. 500,000/- on 13/8/2016, Kshs. 500,000/- on 10/1/2017 and Kshs. 500,000/- on 25/2/2017 but later learnt that the Plaintiff had not channeled the money to Equity Bank as agreed. That accordingly the Plaintiff orally requested for 3 months to settle the outstanding loan for the title to be discharged before he could clear the balance of Kshs.300,000/- a request which the Plaintiff acceded to.
 7. DW1 added that he was later alarmed by the Plaintiff's request to secure another loan against the suit land title deed despite receiving Kshs. 3.7M as part of the purchase price. That he decided to write to Equity Bank and express his reservations and blamed the Plaintiff for failing to issue a notice to complete and unable to discharge the original title deed as agreed. He denied being served with a demand notice or notice of intention to sue and urged the Court to dismiss the Plaintiff's suit and allow his Claim.
 8. He produced the documents in his List of Documents of even date as Dexh. 1-7 and Dexh. 8-17 as contained in the further List of Documents dated 5/9/2018. He beseeched the Court to allow his Counterclaim as drawn. On Court's inquiry, DW1 said the suit land is not occupied.
 9. On 30/11/2021, the Defendant's Counsel filed submissions in support of the Defendant's case. Four issues were drawn for determination namely; whether the sale agreement dated 16/8/2016 was



breached and if so by who; whether the Defendant deserves the order of Specific performance; whether the Defendant deserves general damages in the alternative and whether he is entitled to costs.

10. On the first issue, the Defendant submitted that the parties entered into a valid contract that was reduced into writing according to Section 3(3) of the *Law of Contract Act*. That the purchase price was agreed at Kshs. 4M with the deposit of Kshs. 2M being acknowledged and the balance payable on or before February 2017 out of which Kshs. 3.7M was paid and acknowledged. That the completion date was however not indicated just as time was not of the essence. That he was ready and willing to comply with his contractual obligations and made substantial payments thereof. That he only withheld the balance of Kshs. 300,000/- upon learning that the Plaintiff had not settled the loan facility as agreed and also her oral request for 3 more months to have the title deed discharge. That it is the Plaintiff who failed to honour her contractual obligations by failing to discharge the suit land title.
11. Secondly, that in considering a prayer for Specific performance the Court must satisfy itself that a party that seeks to enforce a sale agreement meets the threshold of a contract of sale of land. That Specific performance is a discretionary remedy granted on well settled principles in respect of a contract that does not suffer from any defect or illegality. The case of *Thrift Homes Ltd –vs- Kenya Investment Ltd* [2015] eKLR was cited in support of that proposition. That a party seeking Specific performance must demonstrate that he has performed or is willing to perform his contractual obligations. See the case of *Gurdev Singh Birdi and Marinder Singh Gatora v Abubakar Madhubuti* CA No. 165 of 1996. The Defendant reiterated that he has substantially performed his obligations to justify an order of Specific performance. That an award for damages would not be adequate as land is a unique commodity. That ordering specific performance would not occasion either of the parties any hardship.
12. On the issue of lack of Land control board consent, the Defendant submitted that it was an attempt by the Plaintiff to void her contractual obligations. That in any event, lack of Land control board consent does not invalidate their sale agreement. Reliance was placed on the decisions in *Macharia Mwangi Maina & 87 Others v David Mwangi Kagiri* [2014] eKLR AND *Willy Kimutai Kitilit v Michael Kibet* [2018] eKLR as cited with approval in *Samuel Chege Gitau & Anor. V Joseph Gicheru Muthiora* [2021] eKLR where the Court of Appeal stated that lack of Land control board consent does not preclude the Court from giving effect to equitable remedy.
13. Last but not least, the Defendant submitted that costs follow the event and having proven his case on a balance of probability, he urged the Court to allow his Counterclaim as drawn.
14. The main issue for determination is whether the Defendant has proven his case. The standard of proof is the degree to which a party must prove its case to succeed. The burden of proof also known as the “onus” is the requirement to satisfy that standard. In civil cases, the burden of proof is on the claimant, and the standard required of them is that they prove the case against the Defendant “on a balance of probabilities”. See section 107 and 108 of the *Evidence Act*.
15. The gist of the Defendant’s counterclaim is for an order of Specific performance directing the Plaintiff to transfer the suit land to him free from any encumbrances. A perusal of the Court file shows that the Plaintiff did not oppose the Counterclaim by way of Defence. Prior to amending her Complaint, the Defendant had filed his Statement of Defence and Counterclaim dated 28/6/2017. In response to that Defence, the Plaintiff filed her Reply to Defence dated 19/7/2017 without objecting to the Counterclaim. Accordingly, the Counterclaim is not opposed. That notwithstanding the Defendant bears the burden of proving his case which is on a balance of probabilities as explained in the preceding paragraph.
16. In support of his claim, the Defendant among other exhibits produced a copy of the Sale agreement dated 18/7/2018 between him and the Plaintiff. The purchase price was expressly agreed as Kshs. 4M



with a deposit of Kshs. 2M paid prior to execution of the agreement and the same was acknowledged by the Plaintiff. The balance of Kshs. 2M was to be paid on or before February 2017, six months after executing the Agreement. It was an express term of the sale agreement that the original title deed would be surrendered to the Defendant upon full payment at which point he would take possession as well. It is not in doubt that parties did not consider time to be of the essence but nevertheless subjected the Agreement to the 1989 LSK Conditions of Sale. The Agreement was executed by both parties and duly witnessed by Zakayo Kimani, Advocate pursuant to Section 3(3) of the Law of Contract Act.

17. The Defendant also produced acknowledgments of part payments for the balance of the purchase price totaling Kshs. 1.8M as follows; Dexh.2 being a payment of Kshs. 500,000/- paid into the Plaintiff's Equity Bank Account No. 0260191404165 on 13/8/2016, Dexh. 3 payment of Kshs. 200,000/- on 24/10/2016, Dexh. 4 and Dexh.5 being payments of Kshs. 500,000/- each on 10/1/2017 and 25/2/2017. Notably clause 2 of Dexh. 4 shows that as at 25/2/2017, the outstanding balance of Kshs. 300,000/-.
18. Pertinently, the Defendant further produced correspondences between his Counsel and the Plaintiff's counsel and surprisingly it appears that the Plaintiff reneged on express terms of the sale agreement by asking the Defendant to pay the loan amount balance of Kshs.891,434/= vide her letter dated 15/8/2017, Dexh. 12. I say so because the demand of Kshs. 891,434/= exceeds the admitted balance of Kshs. 300,000/- as at 25/2/2017 and further that demand alters the total purchase price agreed by the parties from Kshs. 4,000,000/= to a tune of Kshs. 4,591,434/=.
19. As already stated, time was not of the essence in the instant transaction. Applying the 1989 LSK Conditions of Sale, the Plaintiff was required to serve the Defendant with a completion notice. There is no evidence that such notice was ever served. Instead, I find credibility in DW1's testimony that the Plaintiff sought to further charge the suit land title against the Defendant's legitimate expectation of completing the sale agreement and take possession of the suit land. It is against that background that the Defendant wrote to Equity Bank vide D. exh 7 and registered a caution on the suit land as evidenced by D.exh 17 copy of official search dated 13/8/2018 that also confirms that the Plaintiff is the registered owner of the suit land.
20. It is trite that specific performance is a discretionary and equitable remedy. In Reliable Electrical Engineers Ltd vs. Mantrac Kenya Limited (2006) eKLR, the Court held as follows:

“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 unenforceable. 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 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.”



21. For a Court to grant specific performance, it must be satisfied that there existed valid and enforceable contract between the parties. This was held in *Gharib Suleman Gharib V Abdulrahman Mohamed Agil* LLR No. 750 (CAK) Civil Appeal No. 112 of 1998 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.”

22. That position was affirmed in the Court of Appeal in the case of *Gurdev Singh Birdi & Another vs. Abubakar Madhbuti* (1997) eKLR cited by the Defendant that:

“It cannot be gainsaid that the underlying principle in granting the equitable relief of specific performance has always been that under all the obtaining circumstances in the particular case, it is just and equitable so to do with a view to doing more perfect and complete justice. Indeed, as is set out in paragraph 487v of volume 44 of Halsbury’s Laws of England, Fourth Edition, a Plaintiff seeking equitable remedy of specific performance of a contract: ‘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...Where a condition or essential term ought to have been performed by the Plaintiff at the date of the writ, the Court does not accept his undertaking to perform in lieu of performance but dismisses the claim.’”

23. As discussed above, the Defendant has demonstrated that he entered into a valid contract. Absent any evidence to the contrary, that contract is binding on the parties thereto. Reliance is placed on the CoA decision in *National Bank Of Kenya V Pipeplastic Samkolit (K) Ltd & Another* [2001] eKLR that parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved.

24. DW1 went ahead and substantially performed his contractual obligation by paying a total of Kshs. 3.7M out of the agreed Kshs. 4M as at 25/2/2017. He expressed willingness and readiness to pay the balance of Kshs. 300,000/-. The Plaintiff has not contradicted the firm and consistent evidence of the Defendant.

25. Recently the Court of Appeal in the case of *Edward Gitabi Kibia v Thomas Caroll* [2020] eKLR affirmed the trial Court order for specific performance in favour of the Respondent who was always willing and ready to complete his contractual obligation despite the Appellant’s actions to frustrate the Sale agreement.

26. However, it is the Defendant’s own evidence that he entered into a sale agreement for purchase of the suit land knowing very well that it was charged to Equity Bank. The Bank has higher overriding right over the suit land having advanced a loan facility to the Plaintiff. In the event of default, the Bank would be entitled to recover the loan amount as enumerated under Sections 90 and 96 (1) of the *Land Act, 2012* inter alia that;

“Remedies of a chargee.

90.



- (1) If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.

Chargee's power of sale.

96.

- (1) Where a chargor is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default in the notice served on the chargor under section 90 (1), a chargee may exercise the power to sell the charged land."

27. To this end, it is clear that while specific performance is not an adequate remedy in light of the facts of this case and granting it would cause hardship and injustice to the Bank who despite enjoying a superior title by way of security/mortgage was not enjoined in the Counterclaim and or heard on merit. The Defendant entered into the agreement of sale knowing that the property was charged to the bank. Even if it was granted the Plaintiff too would face a hardship in obtaining the title for purposes of satisfying a judgement in favour of the Defendant. Perhaps the Defendant may wish to consider other remedies from Plaintiff. I say no more.

28. Final orders and disposal; -

- a. The Plaintiffs case stands dismissed.
- b. The counterclaim is unmerited. It is dismissed.
- c. I make no order as to costs.

29. Orders accordingly.

DELIVERED, DATED AND SIGNED AT THIKA THIS 5TH DAY OF MAY 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Plaintiff - absent

Defendant – Kabinga holding brief for Mukiri

Interested Party – absent

Court Assistant - Phyllis

