



**Railways Housing Cooperative Society Limited v James Mwarari  
Gatome t/a Gatome & Associates (Environment and Land Case Civil  
Suit 52 of 2020) [2022] KEELC 3798 (KLR) (9 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 3798 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND CASE CIVIL SUIT 52 OF 2020  
CA OCHIENG, J  
MAY 9, 2022**

**IN THE MATTER OF AN APPLICATION FOR AN ORDER OF SPECIFIC PERFORMANCE  
WITH RESPECT TO THE DELIVERY OF 164 TITLES AT BLOCK LR. 7340/95**

**BETWEEN  
RAILWAYS HOUSING COOPERATIVE SOCIETY LIMITED ..... PLAINTIFF  
AND  
JAMES MWARARI GATOME T/A GATOME & ASSOCIATES .... RESPONDENT**

**JUDGMENT**

1. By an originating summons dated the July 7, 2020, the applicant seeks the following orders:

That the respondent be ordered to complete the processing in the names of the individual purchasers of 44 titles namely LR Nos:

1. 3225, 3226-Thomas Adhiambo Agutu
2. 3201, 3202- Elijah Nyamwayah Mbeche
3. 3207, 3208- Hezron Yongo Agan
4. 3336-William Oloo Gombe & Joyce Dirai Omony
5. 3220-Linus Makokha Wafula
6. 3228-Donald Nyongesa Okumu
7. 3245, 3274-Zachary Mahinyu
8. 3295-Silvester Ochieng Abuodha



9. 3189-Aggrey Ogutu & Immaculate Auma Abungu
10. 3238-Isaack Kipchoge Kurgat
11. 3222, 3223-Mary Adhiambo Warega
12. 3271 --Angelina Wanza Mutua
13. 3293 -Sabastian Ringo Joseph Munguti
14. 3283 -Agatha Wangari Mwangi
15. 3254 -Kwena Kenneth Leondoro & Rosemary A. Adet
16. 3232, 3233, 3234-Seth Steve Okute
17. 3245, 3274- Zachary Mahinyu
18. 3193, 3194-Thiringi Mutabari Alex & Susan Kathure Priscah
19. 3215 - Erick Inyanga Webuye
20. 3315 - Roseline Bahati
21. 3278- Phylis Mmboga
22. 3327, 3326 -Duncan M. Maina & Eather Mumbi Thitai
23. 3185- Emmanuel Oukuba Keya
24. 3290, 3291 - Natalie Achieno Bwari
25. 3294 - Faith Muthike Ngila & Serah Ndinda Ngila
26. 3216 - Charles Otieno Orawo
27. 3298-Beatrice Imali Wambulwa
28. 3324-Brian Korir Baliat
29. 3275, 3276, 3277 -Jepharson Maganga Makwida
30. 3289 - Anthony Mark Adongo
31. 3266, 3267 -Margaret Anyango Aluoch
32. 3329 -James Kyalo Makau

2. That the respondent be ordered to deliver in the name of the plaintiff/applicant 120 titles namely Land Reference Numbers;

3343, 3180, 3181, 3182, 3183, 3184, 3186, 3187, 3188, 3190, 3248, 3249, 3250, 3251, 3252,, 3253, 3255, 3256, 3257, 3258, 3259, 3260, 3261, 3262, 3288, 3287, 3286, 3273, 3272, 3270, 3269, 3268, 3265, 3264, 3263, 3247, 3246, 3244, 3279, 3280, 3281, 3282, 3283, 3284, 3285, 3320, 3323, 3319, 3316, 3312, 3311, 3308, 3307, 3306, 3309, 3310, 3313, 3314, 3317, 3318, 3321, 3322, 3325, 3328, 3341, 3340, 3338, 3337, 3335, 3334, 3333, 3332, 3339, 3342, 3299, 3300, 3303, 3304, 3305, 3302, 3301, 3292, 3296, 3297, 3243, 3242, 3241, 3240, 3239, 3237, 3236, 3224, 3227, 3229, 3230, 3231, 3235, 3221, 3219, 3218, 3217, 3214, 3213, 3212, 3203, 3204, 3205, 3206, 3209, 3210, 3211, 3197, 3196, 3195, 3192, 3191, 3330, 3200, 3199, 3198.



3. That respondent be ordered to pay the plaintiff/applicant Kshs 703,000/= together with interests at court rates from the date of default.
4. That the respondent be condemned to pay the costs arising herein.

The originating summons is supported by the affidavit of Aggrey Ogotuthe Applicant's Treasurer where he deposes that in the year 2001, the applicant herein made an application to subdivide its land known as LR N 7340/95 into 164 plots measuring 40 ft by 80 ft with intention of selling the same to the members of the public. He explains that the said subdivision was partly conducted by the respondent herein on behalf of the applicant. He avers that the applicant thereafter engaged the respondent on a two phased transaction involving the processing of the 164 titles in its favour at a cost of Kshs 34,000/= each in the 1<sup>st</sup> phase while processing of titles in favour of individual purchasers at a cost of Kshs 34,000/= per title in 2<sup>nd</sup> phase. He contends that through a letter dated the August 23, 2018, the applicant forwarded to the respondent two cheques of Kshs 700,000/= and Kshs 300,000 for the processing of titles as engaged and further a schedule of all the payments made to the respondent as at the date of the said letter accumulating to Kshs 7,775,000/=. He states that out of Kshs 7,775,000/= received by the respondent, Kshs 5,576,000/= was for the payment with respect to the processing of 164 titles in favour of the applicant described as the 1<sup>st</sup> phase while Kshs 2, 199,000/= accounted for the payment of the 2<sup>nd</sup> phase on *pro rata* basis. Further, at the time, the applicant had forwarded all the completion documents for 44 individual purchasers to the respondent for the processing of titles in their favour. He claims the respondent occasioned inordinate delay in the processing of the 44 titles whose completion documents and processing fees, he had received. Further, through a letter dated October 19, 2018, the applicant sought from the respondent, the status of the 44 titles to be processed whose completion documents, the respondent had already received. He states that the applicant organized and held joint meetings arbitrated by the District Cooperatives Officer, Ministry of Cooperatives where the respondent undertook to deliver the 44 titles to individual purchasers within one (1) month provided he was furnished with rates and rent clearance certificates. Further, the applicant through a letter dated the June 18, 2019 forwarded the clearance certificates to the respondent with respect to the 44 titles to enable their registration in favour of the individual purchasers but the respondent has failed to submit any of the 164 titles despite receiving Kshs 7,775,000/=. He reiterates that some of the purchasers of the parcels of land at Block LR 7340/95 have threatened to commence legal proceedings against the applicant herein while others have filed Civil Suit No 19 of 2020 at the Machakos Environment and Land Court against applicant wherein they are seeking orders of specific performance.

5. The respondent opposed the originating summons by filing a replying affidavit sworn by James Mwarari Gatonyewhere he deposes that the instant application was made without full disclosure of the relevant facts hence it is incompetent and should be struck out. He explains that in the year 2001, the applicant engaged him on a professional capacity to subdivide its parcel of land known as LR No 7340/95. Further, that the applicant required the abovementioned parcel to be divided into 164 parcels measuring 40ft by 80ft. He confirms subdividing the parcel of land into 164 parcels as instructed. He insists upon successful completion of the subdivision, the applicant engaged him in processing of 164 titles in its favour and the subsequent purchasers of the parcels. He contends that contrary to the applicant assertions, the titles were to be processed at a cost of Kshs 68,000/= per title and the same was inclusive of stamp duty. Further, the total cost of processing the 164 titles on behalf of the applicant was Kshs 11,152,000. He confirms that the applicant forwarded to him a sum of Kshs 7,775,000 for processing of the titles as instructed. He states that the applicant owes him Kshs 3,377,000. Further, that the applicant forwarded to him 44 transfers to process in the names of individual clients. He explains that the delay in processing the 44 transfers was partly attributable to the applicant's failure



to furnish him with completion documents required in the said transactions despite making several demands. Further, the delay in processing the 44 transfers is also attributable to the land registry owing to several closures by the Ministry of Lands for auditing of land records and the same cannot be attributed to him. He reiterates that he has routinely appraised the applicant on the progress of the said process through several letters including those dated the February 15, 2019 and April 24, 2019 respectively. He denies that he has failed or declined to submit any of the 164 titles to the applicant and insists he has on several occasions including via a letter dated the March 26, 2018, requested the applicant to forward the remaining transfers for 120 titles and completion documents to enable him process the transfers in the individual purchasers' names but the applicant failed to do so.

6. The applicant filed a further affidavit sworn by Aggrey Ogutu, where he reiterated his averments and insisted it had made full disclosure.

The originating summons was canvassed by way of written submissions.

### Submissions

#### Plaintiff/Applicant submissions

7. The applicant in its submissions reiterated its averments as per the affidavits and confirmed that it indeed contracted the respondent to process a total of 164 titles with respect to LR No 7340 /95 at Mavoko. Further, that the said deliberations are contained in minutes of the special general meeting held on November 15, 2017 and letter dated November 21, 2017 wherein the expected costs of processing the titles was indicated therein. It avers that elements of a valid contract had been met. It further submitted that it had sent a total of Kshs 7, 775,000/= to the respondent including all the necessary documents to process the titles but it is the respondent responsible for the delay. It reiterated that, it is hence entitled to orders of specific performance. Further, that since the respondent had failed to complete the processing of the 120 titles in the names of individual purchasers as agreed by the parties herein, it is only proper that the said titles together with overpayment of Kshs 703,000/= is delivered back to the respondent. To support its averments, it relied on the following decisions: *Stancom Sacco Society Limited V Alliance One Tobacco Limited* (2018) eKLR; *Gateway Insurance Co Ltd V Jamila Suleiman & Another* (2018) eKLR and *Fred I Imbatu v Rashid K Too* (2018) eKLR.

#### Respondent's Submissions

8. The respondent adopted the averments in its replying affidavit as well as the annexures therein. He confirmed that he received Kshs 7,775,000/= but what is in dispute is that the processing costs of Kshs 68,000/= per title was not inclusive of stamp duty payable. Further, that the applicant was to pay Kshs 11,152,000/=. It insists the contractual relationship between them was not reduced in writing and hence the applicant is estopped from claiming there was an agreed amount. It avers that the applicant failed to furnish all the documents to him and hence it is not entitled to orders of specific performance. To support its averments, it relied on the following decisions: *Alghussein Establishment Vs Elton College* (1991) 1 AII ER 267 and *Miller Vs Minister of Pension* (1947).

#### Analysis and Determination

9. Upon consideration of the originating summons including the respective affidavits, annexures thereon and rivaling submissions, the only issue for determination is whether the applicant is entitled to the orders as sought in the said originating summons.

The applicant has sought for orders of specific performance against the respondent in respect to the aforementioned enumerated plots and insists it had furnished all the requisite documents and paid a total of Kshs 7, 775,000/= for the smooth running of the process. The respondent has admitted it was



to process the titles but denied that there was a valid contract between them. Further, it contended that the applicant was to pay a total of Kshs 11,152,000/= as the Kshs, 68,000/= processing fee did not include stamp duty hence the applicant still owes him Kshs 3,377,000/=. He said he had processed some titles and was ready to finalize the process so long as he was paid the balance.

10. It is trite that contracts can either be express as contained in a written agreement or implied by actions/intention of the parties and this is well articulated in the case of *Rose and Frank Co. Vs JR Crompton & Bros Ltd* (1923) 2 KB 293, where Atkin, LJ stated thus: “To create a contract, there must be a common intention of the parties to enter into legal obligations, mutually communicated expressly or impliedly.”

From the intention of the parties herein and based on the correspondence as well as minutes annexed to the respective affidavits, while associating myself with the decision I have cited, I find that there was indeed a contract between the applicant and the respondent.

11. On the prayer for specific performance, I wish to make reference to various annexures herein in respect to the transaction between the parties.

I will highlight an excerpt from annexure ‘AO1’ which is the minutes of special CMC Meeting with Surveyor James Gatome held on November 15, 2017, where it stated that:

The surveyor appreciated the society for having invited him for the meeting and was grateful for past works done by him on parcel of the society. He agreed that he will negotiate valuation for each parcel of land at Kshs 800,000/= which was to attract stamp duty of Kshs 32,000/= per parcel. In general he agreed to process the titles to their rightful buyers at a cost of Kshs 68,000/=. He agreed to approach the process in two phases. ...He further suggested that once the subtitles are out, the Society can have them and arrange in future to transfer to the respective buyers who shall have paid the requisite transfer cost. Each phase was to cost Kshs 34,000/= per parcel.”

12. In the minutes of the meeting held on May 22, 2019, at Minute No4/05/19 title processing (annexure ‘AO 5’), the respondent promised to pay stamp duty for the 23 plots by the following day. In the said minutes, he only reminded the applicant that he was owed Kshs 205,000/=. At Minute No 3/05/19 surveyor’s brief, it was recorded as follows:

He confirmed having delivered the first phase and furnished the society with copies of the said titles. Also indicated that the rates and rents for the 164 No titles had been paid by the society. Also reported the challenges as at the Lands Office. However, he has already paid stamp duty for 21 no. plots in January, 2019 and copies of the same delivered to the Society. He indicated that the valuation had already been done and 23 no plots will only be processed after the society will have obtained clearance certificate on rates and rents from both the Lands office and Machakos County.”

13. I note in the letter dated the April 24, 2019, which the respondent addressed to the applicant, he confirmed that the balance of the fees for the 26 titles was Kshs 205, 000/=. In response to the said letter, the applicant vide its letter dated June 18, 2019, forwarded to the respondent, 44 clearance certificates for ex LR No 7340/95. Further, from the bank statements including cheques annexed to the supporting affidavit, it is evident the applicant paid to the respondent the said Kshs 7, 775,000/=.

14. In the case of Gurdev *Singh Birdi & Marinder Singh Gbatora vs Abubakar Madhubuti*, where the Court of Appeal in Civil Appeal No 165 of 1996, 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.”

In the case of *Thrift Homes Ltd V Kenya Investment Ltd* 2015 eKLR, the court stated that:

Specific performance like any other equitable remedy is discretionary and will be granted on well settled principles. The jurisdiction of specific performance is based on the existence of a valid enforceable contract and will not be ordered if the contract suffers from some defects or mistake or illegality. Even where a contract is valid and enforceable, specific performance will not be ordered where there is an adequate alternative remedy. The court then posed the question as to whether the plaintiff who was seeking specific performance in that case had shown that he was ready and able to complete the transaction.”

Steadman -vs- Steadman (1976) AC 536, 540,\*\*

If one party to an agreement stands by and lets the other party incur expense or prejudice his position on the faith of the agreement being valid he will not then be allowed to turn around and assert that the agreement is unenforceable.”

15. See also the cases of *Alton Homes Limited & another v Davis Nathan Chelogoi & 2 others* [2018] eKLR and *Reliable Electrical Engineers Ltd Vs Mantrac Kenya Limited* (2006) eKLR.

16. Based on my analysis above while associating myself with the decisions cited, it is my considered view that the applicant has demonstrated through evidence that it had performed all the terms of the implied contract which it was entitled to perform, but it is actually the respondent who failed to process the aforementioned titles as had been agreed. I opine that since in the excerpts from the two minutes, the respondent actually accepted the Kshs 68,000/= as processing fees which included payment of stamp duty and cannot now claim that the stamp duty was an extra charge culminating in his claiming that he was owed Kshs 3, 377,000/ =. Further, from all the correspondence between the parties, there is no indication that the applicant was to pay him a total of Kshs 11,152,000/= he now seeks.

On the prayer for refund of Kshs 703,000/=, I find that the applicant has not proved the over payment and will decline to grant it.

17. It is against the foregoing while relying on the abovementioned decisions and also anchoring my determination on the principles enshrined in articles 2, 4 and 10 of the *Constitution* in respect to social justice and equity, I find that since the respondent already received all the monies including documents, he is estopped from declining to process and hand over the aforementioned titles to the applicant as had been agreed.

On the issue of costs, since the applicant is the inconvenienced party, it is entitled to costs of this suit.

In the circumstance, I find that the applicant has proved its case on a balance of probability and will enter Judgment in its favour and proceed to make the following orders:

That the defendant/respondent be ordered to complete the processing in the names of the individual purchasers of 44 titles namely LR Nos:

1. 3225, 3226 – Thomas Adhiambo Agutu
2. 3201, 3202 – Elijah Nyamwayah Mbeche
3. 3207, 3208 – Hezron Yongo Agan
4. 3336 – William Oloo Gombe & Joyce Dirai Omunyu



5. 3220 – Linus Makokha Wafula
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24. 3290, 3291 - Natalie Achieno Bwari
25. 3294 – Faith Muthike Ngila & Serah Ndinda Ngila
26. 3216 - Charles Otieno Orawo
27. 3298 – Beatrice Imali Wambulwa
28. 3324 - Brian Korir Baliat
29. 3275, 3276, 3277 - Jepharon Maganga Makwida
30. 3289 – Anthony Mark Adongo
31. 3266, 3267 – Margaret Anyango Aluoch
32. 3329 – James Kyalo Makau,

18. That the defendant/respondent be and is hereby ordered to deliver in the name of the plaintiff/ applicant 120 titles namely Land Reference Numbers; 3343, 3180, 3181, 3182, 3183, 3184, 3186, 3187, 3188, 3190, 3248, 3249, 3250, 3251, 3252,, 3253, 3255, 3256, 3257, 3258, 3259, 3260, 3261, 3262, 3288, 3287, 3286, 3273, 3272, 3270, 3269, 3268, 3265, 3264, 3263, 3247, 3246, 3244, 3279, 3280, 3281, 3282, 3284, 3285, 3320, 3323, 3319, 3316, 3312, 3311, 3308, 3307, 3306, 3309, 3310,



3313, 3314, 3317, 3318, 3321, 3322, 3325, 3328, 3341, 3340, 3338, 3337, 3335, 3334, 3333, 3332, 3339, 3342, 3299, 3300, 3303, 3304, 3305, 3302, 3301, 3292, 3296, 3297, 3243, 3242, 3241, 3240, 3239, 3237, 3236, 3224, 3227, 3229, 3230, 3231, 3235, 3221, 3219, 3218, 3217, 3214, 3213, 3212, 3203, 3204, 3205, 3206, 3209, 3210, 3211, 3197, 3196, 3195, 3192, 3191, 3330, 3200, 3199, 3198.

19. That costs of this suit is awarded to the applicant.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 9TH DAY OF MAY,  
2022**

**CHRISTINE OCHIENG**

**JUDGE**

