



Orion East Africa Limited v ITE Farmers Co-operative Society Limited (Environment and Land Case Civil Suit 283 of 2011) [2022] KEELC 2515 (KLR) (7 July 2022) (Ruling)

Neutral citation: [2022] KEELC 2515 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 283 OF 2011**

SO OKONG'O, J

JULY 7, 2022

BETWEEN

ORION EAST AFRICA LIMITED PLAINTIFF

AND

ITE FARMERS CO-OPERATIVE SOCIETY LIMITED DEFENDANT

RULING

- 1 The facts of this case are set out in this court's judgment that was delivered on 28th March 2019. The plaintiff had moved the court seeking the following reliefs;
- a. A declaration that there was a binding agreement for sale between the plaintiff and the defendant and that the defendant was contractually bound to complete the sale and transfer of the suit property to the plaintiff.
 - b. A declaration that the purported rescission of the agreement for sale by the defendant was illegal and/or unlawful and/or had been waived by the defendant.
 - c. An order for specific performance be issued directing the defendant to complete the sale and transfer of Plot No. L.R 12672/47 I.R 47800 to the plaintiff free from all encumbrances.
 - d. An order of permanent injunction be issued restraining the defendant from ingressing, egressing, accessing, selling, offering for sale, charging and or in any other way whatsoever interfering with the plaintiff's ownership and or quiet possession of Plot No. L.R 12672/47 I.R 47800.
 - e. An order vesting Plot No. L.R 12672/47 I.R 47800 in the plaintiff free from all encumbrance.
 - f. Costs of the suit and interest.
 - g. Any other order that the court shall deem just and fit to grant.



- 2 The plaintiff had averred that it entered into an agreement for sale with the defendant under which the defendant agreed to sell to it and it agreed to purchase from the defendant a portion of land known as Plot No. 28 (hereinafter referred to as “the suit property”) which was part of a larger parcel of land known as L.R No. 12672/47 situated at Kigwaru Estate along Limuru Road at a consideration of Kshs 13,000,000/-. The plaintiff averred that pursuant to the said agreement, it paid to the defendant a sum of Kshs. 2,000,000/- as a deposit receipt of which was acknowledged by the defendant. The plaintiff averred that it was a term of the said agreement that upon payment of the said deposit the defendant would avail all completion documents to the plaintiff after which the plaintiff would pay the balance of the purchase price in the sum of Kshs. 11,000,000/-.
- 3 The plaintiff averred that it was at all material times able, willing and ready to complete the agreement by paying the balance of the purchase price subject to receipt of the completion documents as aforesaid. The plaintiff averred that due to the defendant’s refusal to furnish the completion documents, it decided to seek financing from a bank to pay the balance of the purchase price. The plaintiff averred that it managed to obtain a banking facility from Equity Bank which through its advocates gave the defendant a professional undertaking to pay to the defendant a sum of Kshs. 9,100,000/- upon successful registration of the transfer of the suit property in favour of the plaintiff. The plaintiff averred that it paid to the defendant a further deposit of Kshs. 1,900,000/- making a total deposit of Kshs. 3,900,000/-. The plaintiff averred that this deposit of Kshs. 3,900,000/- together with Equity Bank’s undertaking of Kshs. 9,100,000/- was sufficient to meet the purchase price of Kshs. 13,000,000/-.
- 4 The plaintiff averred that on 17th February, 2010, the defendant purported to serve it with a completion notice and on 8th March, 2010, the defendant purported to rescind the agreement for sale on account of a purported non-completion by the plaintiff. The plaintiff averred that the purported rescission was unlawful, irregular and in bad faith as it had completed the sale agreement notwithstanding the fact that the defendant was yet to furnish it with the completion documents.
- 5 The defendant filed a statement of defence on 2nd October, 2012 in which the defendant admitted that it entered into an agreement for sale of the suit property with the plaintiff. The defendant also admitted the terms of the said agreement which it averred was subject to Law Society Conditions of Sale (1989) Edition. The defendant averred that pursuant to the terms of the said agreement for sale the defendant was to release the completion documents only upon receipt of a professional undertaking from the plaintiff’s advocates that they shall pay to the defendant a sum of Kshs. 11,000,000/- being the balance of the purchase price upon registration of the transfer in the plaintiff’s favour. The defendant averred that the plaintiff was at all material times not in a position to complete the transaction.
- 6 The defendant averred that after paying a deposit of Kshs. 2,000,000/- and providing a professional undertaking in the sum of Kshs. 9,100,000/- there was a balance of Kshs. 1,900,000/- payable by the plaintiff to the defendant. The defendant averred that it was this balance of Kshs. 1,900,000/- that prompted the completion notice dated 10th February, 2010. The defendant averred that the agreement for sale between it and the plaintiff stood rescinded as at 3rd March, 2010 due to the plaintiff’s failure to pay the said sum of Kshs. 1,900,000/- or to furnish a professional undertaking in respect thereof.
- 7 The defendant averred that notwithstanding the fact that the agreement for sale had been rescinded as aforesaid and the plaintiff duly notified, the plaintiff deposited into the defendant’s account a sum of Kshs. 1,900,000/- on 24th March, 2010. The defendant averred that upon receipt of the said amount, it sought a confirmation from the plaintiff whether the professional undertaking that had been given by Equity Bank was still in force which confirmation did not come forth.



- 8 The defendant averred that on 28th June, 2010, it gave the plaintiff a 14 days completion notice to complete the agreement for sale within which period the plaintiff failed to affirm the professional undertaking for Kshs. 9,100,000/- that had been provided by Equity Bank for the balance of the purchase price. The defendant averred that the agreement for sale stood rescinded on 10th July, 2010 and that it was not ready to receive a further deposit of Kshs. 5,000,000/- that was paid by the plaintiff on 26th April, 2011. The defendant averred that following the rescission of the said agreement, it entered into another agreement for sale with a third party in respect of the suit property. It averred that this suit had been overtaken by events.
- 9 The suit went to trial and both parties tendered evidence. Thereafter, the court framed the following issues for determination;
1. Whether the rescission by the defendant of the agreement for sale between the plaintiff and the defendant dated 10th December, 2009 was lawful.
 2. Whether the plaintiff was entitled to the reliefs sought in the plaint.
 3. Who was liable for the costs of the suit?
- 10 On the first issue, the court found that the completion notice dated 28th June, 2010 that was served upon the plaintiff by the defendant was unjustified and had no basis under the agreement for sale between the parties since the plaintiff had already fulfilled its part of the said agreement for sale as at the time it was served. The court therefore held that the purported rescission of the agreement of sale by the defendant was unlawful. On the second issue, the court the court found that the plaintiff had satisfied the conditions for granting an order for specific performance and that no valid reason had been put forward to deny the plaintiff an order for specific performance. On the issue of costs, the court held that although the plaintiff had succeeded on its claim, its conduct was such that it was not entitled to costs.
- 11 In conclusion, the court entered judgment for the plaintiff against the defendant on the following terms;
- a. A declaration that there was a binding agreement of sale between the plaintiff and the defendant and that the defendant was contractually bound to complete the sale and transfer of the suit property to the plaintiff.
 - b. A declaration that the purported rescission of the agreement of sale by the defendant was illegal and/or unlawful and/or had been waived by the defendant.
 - c. An order for specific performance directing the defendant to complete the sale and transfer of Plot No. L.R 12672/47 I.R 47800 to the plaintiff free from all encumbrances.
 - d. An order of a permanent injunction restraining the defendant from ingressing, egressing, accessing, selling, offering for sale, charging and or in any other way whatsoever interfering with the plaintiff's ownership and or quiet possession of Plot No. L.R 12672/47 I.R 47800.
 - e. Each party to bear its own costs of the suit.
- 12 I now have before me two applications, one by the plaintiff and the other by the defendant. The plaintiff's application was brought by way of Notice of Motion dated 16th August 2021 seeking the following orders; an order vesting the suit property upon the plaintiff subject to the plaintiff depositing in court the balance of the purchase price in the sum of Kshs. 1,900,000/-, an order for the Chief Land Registrar to register the plaintiff as the absolute proprietor of the suit property and issue it with a certificate of title after which the said sum of Kshs. 1,900,000/- shall be released to the defendant, and



the costs of the application to be borne by the defendant. The application that was supported by the affidavit of Peter Ruo Maina was brought on the grounds that the defendant had refused to comply with the judgment of the court despite several demands made on it to do so. The plaintiff averred that it was all along ready and willing to pay to the defendant the balance of the purchase price in the sum of Kshs. 9,100,000/- upon being furnished with the necessary completion documents. The plaintiff averred that it was 2 years since the date of the judgement and the defendant had continued to deny him the fruits of judgement. The plaintiff averred that the orders sought by the plaintiff would serve the interest of justice and fairness and would bring the 10 years of litigation to an end.

- 13 The defendant's application was brought by way of Notice of Motion dated 19th April 2021 in which the defendant sought the following reliefs; the firm of Kaka Kamau & Co. Advocates be granted leave to come on record for the defendant in place of the defendant's previous advocates in terms of the consent dated 12th April 2012 entered into between the said advocates, the court be pleased to interpret the judgment dated 28th March 2019 and more particularly clause 15(c) of the sale agreement which provided for the payment of interest at 20% to be able to determine the balance of the purchase price of the suit property, that upon the determination of the balance of the purchase price, the plaintiff be ordered to pay the same within 30 days in default of which the judgment be declared to have been frustrated and the defendant be at liberty to refund the monies paid as deposit to the plaintiff, and that the court do grant such other or further orders as deemed necessary and expedient.
- 14 This application that was brought on the grounds set out in the affidavit of Francis Kago Gathuo sworn on 19th April 2021 was brought on the grounds that since judgment was entered in this matter on 28th March 2019, the plaintiff had not taken steps to satisfy the same. The defendant contended that the plaintiff had not called for the completion documents accompanied by a professional undertaking that the balance of the purchase price would be paid within 7 days of registration of the transfer. The defendant averred that when it noted that the plaintiff had gone quiet, it took the initiative of writing to the plaintiff demanding the balance of the purchase price so that it could hand over the completion documents together with the transfer to the plaintiff. The defendant averred that in computing the balance of the purchase price, it added to the balance of the purchase price in the sum of Kshs. 9,100,000/- interest at the rate of 20% per annum up to November 2020 which brought the outstanding amount to Kshs. 28,513,333/-. The defendant averred that the said interest was charged pursuant to clause 15(c) of the agreement of sale dated 10th December 2009. The defendant averred that as an alternative, it offered to refund to the plaintiff its deposit of Kshs. 3,900,000/- together with interest which brought the total refund offered to Kshs. 12,220,000/-.
- 15 The defendant averred that the plaintiff rejected its computation of the outstanding balance of the purchase price. The defendant averred that it was ready to comply with the terms of the judgment so as to bring the dispute to a close. The defendant averred that it was only fair that the orders sought be granted. The defendant refuted the plaintiff's claim that it refused to comply with the judgment of the court. The defendant contended that the plaintiff's application was an abuse of the process of the court as the same was intended to scuttle the defendant's application.
- 16 The two applications were heard together. The advocates for the parties relied entirely on their affidavits in support of and in opposition to each other's application and left the matter for the decision of the court. I have considered the two applications and the affidavits filed in support thereof. I will consider the plaintiff's application first. I have set out earlier in this ruling the orders sought by the plaintiff in its application. In summary, the plaintiff is seeking the assistance of the court in the enforcement of the judgment made by the court herein on 28th March 2019 and the subsequent decree extracted therefrom on 21st June 2019. It is not disputed that the court has power to enforce its orders and decrees. It follows therefore that the court has power to grant the orders sought by the plaintiff.



However, the orders sought by the plaintiff are of such a nature that the same can only be issued where there is no way in which the defendant can be compelled to comply with the court decree. There is no evidence that the plaintiff has taken any step to compel the defendant to comply with the decree of the court. The court cannot make an order vesting the suit property on the plaintiff while the defendant is in existence and is capable of executing a transfer of the property in favour of the plaintiff. In the event that the defendant refuses to do so, the court has power to compel it to comply. Due to the foregoing, I am of the view that the plaintiff's application is premature. The orders sought by the plaintiff are therefore not for granting.

- 17 With regard to the defendant's application, the leave sought for the firm of Kaka Kamau & Co. Advocates to come on record for the defendant is not opposed. The same shall be granted. The other prayers are seeking the interpretation of the judgment of 28th March 2019 as concerns the issue of interest and a determination of the balance of the purchase price due from the plaintiff to the defendant. The remaining prayers are consequential upon the determination of the said balance of the purchase price payable.
- 18 I am of the view that the judgment of 28th March 2019 does not require any interpretation either on the issues that were determined by the court or the orders made. The court considered the issues that were raised before it, determined the same and entered judgment based on its determination on those issues. The issue of the balance of the purchase price was not raised before the court. There was no dispute between the parties that the balance of the purchase price was Kshs. 9,100,000/- in respect of which the defendant had been given a professional undertaking. The defendant did not contend that any interest was due and payable on the said sum of Kshs. 9,100,000/-. The court was therefore not called upon to determine such issue. I am of the view that the defendant is trying through the present application to reopen the suit that has been determined for further litigation on issues that were never raised and as such were not determined by the court. I am of the opinion that this attempt must be resisted by the court. The court having considered all the issues raised by the parties and made a determination, it is functus officio and cannot reopen the proceedings for further argument on matters that were not raised before it.
- 19 I have noted that the defendant's application has been brought under among others, section 34(1) of the *Civil Procedure Act*, Chapter 21 Laws of Kenya. I am not satisfied that the issues raised by the defendant fall for determination under that section. The issue of interest if any payable on the balance of the purchase price of Kshs. 9,100,000/- cannot be said to be an issue that has arisen during the execution of the judgment of the court. In my view, it is a non-issue. In the agreement of sale dated 10th December 2009, between the plaintiff and the defendant, interest is referred to in clauses 13 and 15(c) of the same. Clause 13 of the agreement provides that in the event that the agreement was terminated due to a breach on the part of the defendant, the defendant was to refund to the plaintiff the entire deposit together with interest at the rates provided in the said agreement. Clause 15(c) of the agreement provides that the rate of interest payable under the agreement was 20% per annum. That means that if the defendant was in breach of the agreement and was to refund the deposit, it was to do so together with interest at the rate of 20% per annum.
- 20 The agreement for sale did not provide anywhere that the balance of the purchase price was to attract interest. The defendant has not pointed out in its application or affidavit in support thereof the basis for its claim for interest on the balance of the purchase price of Kshs. 9,100,000/-. It follows therefore that even if it is assumed that the issue of interest is an issue arising in the course of execution of the decree, I do find and hold that no interest is payable to the defendant on the balance of the purchase price of Kshs. 9,100,000/-. There is no basis for the claim.



- 21 Due to the foregoing, I find no merit in the defendant's application. It is my finding that the judgment of the court delivered on 28th March 2019 does not require interpretation. As concerns clause 15(c) of the agreement of sale dated 10th December 2009, it is my finding that the interest provided for thereunder was payable by the defendant on the deposit that was paid to it in the event that the agreement was terminated on account of the breach thereof by the defendant. The plaintiff was not liable to pay any interest to the defendant on the balance of the purchase price under the said agreement of sale. On the balance of the purchase price, I hold that the same was not in dispute. The balance of the purchase price was Kshs. 9,100,000/- and remains the same.
- 22 In the final analysis and for the foregoing reasons, I hereby make the following orders on the two applications before the court;
1. The plaintiff's application dated 16th August 2021 is premature. The same is struck out.
 2. The defendant's application dated 19th April 2021 has no merit. The same is dismissed.
 3. Each party shall bear its own costs of the two applications.

DELIVERED AND DATED AT NAIROBI THIS 7TH DAY OF JULY 2022

S. OKONG'O

JUDGE

Ruling delivered through Microsoft Teams Video Conferencing platform in the presence of;

Mr. Orege h/b for Mr. Nganga for the Plaintiff

Mr. Kaka for the Defendant

Ms. C. Nyokabi-Court Assistant

