



**Karimi v Kilifi Plantations Limited (Civil Suit 236 of 2017)  
[2022] KEELC 14711 (KLR) (8 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14711 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
CIVIL SUIT 236 OF 2017  
MAO ODENY, J  
NOVEMBER 8, 2022**

**BETWEEN**

**JAMES KARIMI ..... PLAINTIFF**

**AND**

**KILIFI PLANTATIONS LIMITED ..... DEFENDANT**

**JUDGMENT**

1. By a plaint dated 5<sup>th</sup> September 2017 the Plaintiff herein sued the Defendant seeking the following prayers; -
  - a. Kshs. 5,631,621 on account of special damages.
  - b. Specific performance of the contract between the plaintiff and the defendant and in the alternative, the allocation by the defendant to the plaintiff of an alternative property valued at Kshs. 4,500,000
  - c. Costs and incidentals to this suit and interest thereof at court rates.
2. In response the Defendant filed an amended defence and counterclaim seeking the following orders: -
  - a. A declaration that the Defendant is not entitled to the orders of specific performance of the contract and in the alternative that the Defendant is not entitled to the allocation of an alternative property valued at kshs 4,500,000/
  - b. Loss of user due to malfunctioning and drying up of the boreholes
  - c. Loss of materials
  - d. General damages for breach of contract
  - e. Costs and interest thereon at commercial rates.



- f. Any other or further order that the Honourable Court may deem fit to grant.

### **Plaintiff's Case**

3. PW1 James Karimi adopted his witness statement and the list of documents and stated that on or about 29<sup>th</sup> September 2014, he entered into an agreement with the Defendant which entailed drilling and casing of boreholes on the Defendant's property and in lieu the Defendant agreed to allocate him a portion of land whose purchase price was settled at Kshs. 4,500,000/=.
4. PW1 further stated that the Defendant in 2014, allocated him Plot No. Kilifi/GroupV/802 situated in Kilifi where he commenced construction and that on 15<sup>th</sup> March 2016 after construction of the main structures, he filed an application for supply of water to the suit property to Kilifi Mariakani Water and Sewerage Company which approval was granted by the Defendant.
5. It was PW1's evidence that sometimes in May 2016, he proceeded to the suit property and found out that the Defendant had allocated the suit property to a third party causing him loss in terms of special damages as set out in the plaint to the tune of Kshs. 5,631,621/=.
6. On cross examination by Mr. Ole Kina he stated that the suit property was not a gift as there was consideration to be exchanged for receipt of the land. He added that there was no specific number of boreholes to be drilled and that he was aware that there was a dispute regarding the depth, circumference and casings used in the drilled boreholes.
7. On re- examination by Ms Mwangi PW1 stated that he confronted Mr. Christopher Wilson on the issue and he told PW1 that he had forgotten that he had sold the land earlier to a Mr. Osoro. He further stated that the Defendant offered to give him another portion of land on condition that he drills two more boreholes but he had already put up structures on the first portion of land which had cost him a lot of money.

### **Defendant's Case**

8. DW1 Christopher Wilson a Director of the Defendant also adopted his witness statement and stated that the Plaintiff and Defendant entered into an agreement for construction of boreholes for the Defendant and that the Plaintiff would choose a plot from the plots available at the time which would be worth Kshs. 4,500,000/= and consequently the Defendant allocated the Plaintiff Plot No. Kilifi/ Group V 802 despite issues arising on the workmanship of the boreholes.
9. DW1 further stated that the Plaintiff approached the Defendant with a view to replace the plot with another Plot no. Kilifi/Group V 834 of which the parties entered into an agreement and signed but the Plaintiff later changed his mind and rejected the replacement property hence in breach.
10. On cross examination he testified that there was an agreement that the Plaintiff drill boreholes for the Defendant and that there was no written complaint regarding the boreholes.
11. DW2- Abdulahi Wocharo testified that he has worked as a hydrogeologist for 20 years with the government and also worked for the Defendant and prepared the report dated 15<sup>th</sup> October 2018 which he produced as Dex No. 3
12. On cross examination DW2 stated that he assessed 5 boreholes as per the instruction and noticed that 3 boreholes were in use and some had no pumps. DW2 also stated that the 5 boreholes had issues of wrong diameters as the standard diameter for a borehole is 8 inches and these ones were 6 inches.



13. It was DW2's testimony that he found out the history of the boreholes and established that they were initially working but later started having less water and some of the pumps were removed from the boreholes.
14. On reexamination DW2 stated that if the diameter of the borehole decreases the water volume also decreases and that he recommended that another borehole be drilled next to the existing borehole using hydrological standards.

### **Analysis And Determination**

15. The issues for determination are whether the Plaintiff is entitled to special damages of Kshs. 5,631,621/= and an order of specific performance for allocation of alternative property valued at Kshs. 4,500,000/=.
16. The Plaintiff stated that they entered into an agreement with the Defendant which entailed drilling and casing of boreholes on the Defendant's property and in lieu the Defendant agreed to allocate him a portion of land whose purchase price was settled at Kshs. 4,500,000/=.
17. It is also on record that the Defendant in 2014, allocated the Plaintiff Plot No. Kilifi/GroupV/802 situated in Kilifi where the commenced construction and that on 15<sup>th</sup> March 2016 after construction of the main structures, he filed an application for supply of water to the suit property to Kilifi Mariakani Water and Sewerage Company which approval was granted by the Defendant. This is not disputed by the Defendant.
18. The Defendant also admitted that indeed they entered into an agreement for drilling of boreholes and that he would pay the Plaintiff with a plot worth Ksh. 4.5million which he allocated the Plaintiff and allowed him to start construction.
19. In the case of *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG (UK Production)* [2010] UKSC14, [45] the Supreme Court of the United Kingdom stated as follows: -

“The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement.”
20. The evidence on record shows that there was an agreement that the Plaintiff drills boreholes and the communication between the Plaintiff and the Defendant by words or by conduct of allocating the Plaintiff a portion of a plot, allowing the Plaintiff to construct structures, approving water connection to the suit land was intended to create which were binding.
21. Section 3(3) of the [Law of Contract Act](#) in 2003, the subsection read as follows:
  - (3) No suit shall be brought upon a contract for disposition of an interest in land unless the agreement upon which, the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign if;



Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract-

- (i) Has in part performance of the contract taken possession of the property or any part thereof: or
- (ii) Being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract

22. If the Defendant did not want the agreement to create a legally binding relationship, then he would not have allowed the Plaintiff to proceed with the borehole drilling and the construction of the structures on the suit land. The Defendant would also have not approved the application for water connection to the suit land. This was acquiesce. This was in furtherance of the contract.
23. The agreement also stipulated that the Plaintiff would be paid for the work done by allocation of a plot in lieu of the payment. It is also on record that the Plaintiff actually drilled the boreholes as confirmed by DW2 the Hydrogeologist who stated that he assessed 5 boreholes as per the instruction and noticed that 3 boreholes were in use and some had no pumps.
24. It was DW2's testimony that he found out from the history of the boreholes and established that they were initially working but later started having less water and some of the pumps were removed from the boreholes.
25. This evidence is a confirmation that the Plaintiff performed his part of the agreement and therefore deserves to be paid for the work done. The Defendant raised some issues with the quality of the work done by the assessment by DW2 who questioned the diameters of the borehole which was only raised after the case had been filed and not when the process was being undertaken. If there were any issues with the workmanship, then the Defendant could have raised it when the work was ongoing.
26. The Defendant could not have allowed the Plaintiff to continue with the construction on the suit plot which the Defendant later admitted that he had forgotten that he had sold it to a third party a Mr. Osoro. This is the reason why the Defendant wanted to give the Plaintiff an alternative plot worth Kshs. 4.5Million.
27. The Defendant cannot have his cake and eat it, the Plaintiff having performed his part of the contract is entitled to compensation. The court is cognizant of the fact that it cannot rewrite contracts for parties as was held in the case of *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* [2001] eKLR. the court is only under a duty to infer from the agreement.
28. The Plaintiff stated that he incurred a loss of Kshs. 5,631,62 /= due to the extensive construction that was carried out in the property. According to the valuation report provided by Moina Chege & Co Property Investment Consultants the particulars of the loss were as follow: -
  - a. site clearance and levelling Kshs 500,000/
  - b. Boundary wall. Kshs. 694,050/
  - c. Guest house... Kshs 1,995,000/
  - d. Staff/store room Kshs 580,800/
  - e. Main house Kshs 1,566,000/
  - f. Borehole Kshs 250,000/



- g. Main water connection
  - h. Perimeter pipe Kshs 20,000/
  - i. Evacuation for water tank Kshs 25,771 /
  - j. Allocation of another property valued at Kshs ...4,500,000/
  - k. Total.....Kshs. 5,631,621/=
29. Special damages must be specifically pleaded and specifically proved as was held in the case of *Provincial Insurance Co. EA Ltd vs Mordekai Mwanga Nandwa*, KSM CACA 179 of 1995 (ur).
- “ ... It is now well settled that special damages need to be specifically pleaded before they can be awarded. Accordingly, none can be awarded for failure to plead. It is equally clear that no general damages may be awarded for breach of contract ... ”.
30. It would be unrealistic to conclude that the Plaintiff and the Defendant never intended to complete the agreement for drilling of the boreholes and the payment by allocation of a plot in lieu cash payment. Both parties intended the agreement to be legally binding and each party embarked on the performance of their respective obligation until they hit the headwinds of the plot having been sold to a third party.
31. On the issue of whether the Plaintiff is entitled to an order of specific performance, a party must satisfy the principles for grant of specific performance as was laid down in the case of *Reliable Electrical Engineers Ltd vs Mantrac Kenya Limited* (2006) eKLR, wherein 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 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 an adequate remedy specific performance may still be refused on the ground of undue influenced or where it will cause severe hardship to the Defendant.”
32. An order for specific performance is an equitable remedy which, like all equitable remedies, is available at the court’s discretion. It is an order that is however rarely granted unless the Plaintiff is able to show that damages would not be an adequate remedy.
33. The Plaintiff complied with the agreement that he entered into with the Defendant whereby he was to drill boreholes which he did. The Defendant reneged on his obligation and did not actualize the full allocation of the suit plot which was the mode of payment for the work done.
34. I find that the Plaintiff has proved his case on a balance of probabilities that there was a valid agreement with the Defendant and has further proved the special damages incurred in the construction of the structures on the suit plot. The Plaintiff produced a valuation report and photographs of the construction on the suit plot.



35. I have considered the pleadings, the evidence on record, the submissions by counsel and issue the following specific orders that the Defendant do pay the Plaintiff Kshs 5,631,621/ on account of special damages. The Plaintiff is also entitled to the costs of the suit. Defendant's counterclaim is hereby dismissed with costs

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 8<sup>TH</sup> DAY OF NOVEMBER, 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*.

